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IS CONTRACT LAW LIBERAL? ON AUTONOMY AND EXCHANGE

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ABSTRACT. *Autonomy theories of contract are influential and have many attractions, not least their compatibility with liberal ideals. However, such theories cannot account for basic features of the common law of contract, in particular: the role of established transaction types, the doctrine of consideration and the phenomenon of contractual obligation. An exchange theory of contract can account for those features of the law. This theory's liberal credentials can be established by connecting it to an alternative intellectual strand in the liberal tradition, sometimes known as commercial liberalism.*

KEYWORDS: *contract*, *autonomy*, *exchange*, *liberalism*.

I. INTRODUCTION

This article is about two rival theories of contract law and their place in the liberal tradition. The first theory links contract to individual autonomy. It has considerable attractions. Liberal societies and liberal philosophers tend to esteem individual choice. The parties who enter a contract typically choose to do so and moreover the facility of contracting seems to expand the range of individual choice dramatically by allowing one to do all sorts of things one could not easily do otherwise (e.g. buy a car, get a job, run a business). Furthermore, many aspects of contract doctrine (such as the requirement of mutual assent and vitiating doctrines such as duress and misrepresentation) as well as accompanying rhetoric ("freedom of contract") seem to evince concern for party autonomy.

Yet, autonomy – it is worth someone pointing out every now and then – cannot explain some truly basic features of the common law of contract. One feature is the role of particular "transaction types" such as sales, leases, employments, pledges and so on. The dense clusters of legal rules governing these transaction types are not oriented by any guiding ideal of individual autonomy. Nor can an autonomy theory explain the common law's signature doctrine of consideration, which holds parties'

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informal choices to be irrelevant unless they choose to enter an exchange. Finally, an autonomy theory cannot explain the fundamental phenomenon of contractual obligation: why a contract binds each party to the other to perform her side of the deal, depriving her of the freedom to choose differently.

Another theory of contract can explain these features of the law: an exchange theory. On this view contract law is concerned to uphold not the autonomy of the individual but certain kinds of relationship or transaction – including sales, leases, employments, pledges and the many other established contractual types. As a rough generalisation, we can say these are all forms of exchange. That generalisation is reflected in the consideration doctrine. Finally, because each party to an exchange ought to perform her side of it, an exchange theory explains why a contract entails a form of interpersonal obligation.

If contract law is not at root concerned for individual autonomy but rather seeks to uphold certain types of relationship – roughly speaking, exchanges – can we still regard contract as a liberal institution? Given contract law's "apparent closeness to the conceptive heartland of liberalism", it would be problematic if a theory did not show it to have liberal credentials.[1] The article will end by connecting the exchange theory of contract to another strand in the liberal tradition, admittedly less eminent among philosophers and legal theorists than the autonomy ideal: what is sometimes called commercial liberalism.

II. Liberalism, Autonomy and Contract

An influential theoretical tradition holds contract law to be a liberal institution that furthers individual autonomy. The august lineage of this view is traceable at least to the heyday of "classical liberalism" – that "peculiarly unified", "everyday political philosophy of the nineteenth century" which gained extraordinary influence in England and beyond.[2]

An exemplary figure is Herbert Spencer, the self-educated polymath who became, after stints as a railway engineer and a subeditor for *The Economist*, perhaps the most famous intellectual of his day.[3] Spencer constructed a comprehensive philosophico-scientific system (said to occupy several feet of shelving in most of the public libraries in England)[4] encompassing everything from politics to psychology and biology. His ethical philosophy is built upon a foundational principle of individual autonomy.

[1] P. O'Malley, "Uncertain Subjects: Risks, Liberalism and Contract" (2000) 29 Economy and Society 460, 468.
[2] J.M. Keynes, "The End of Laissez-Faire" in E. Johnson and D. Moggridge (eds.), *The Collected Writings of John Maynard Keynes: Essays in Persuasion*, vol. IX (Cambridge 1978), 276.
[3] H. Spencer, *An Autobiography*, vol. 1 (London 1904); T.H. Eriksen and F.S. Nielsen, *A History of Anthropology* (London 2001), 37.
[4] Spencer, *Autobiography*, 49, quoting a barbed remark by the Reverend Thomas Mozley.

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"[E]ach man may claim the fullest liberty to exercise his faculties" and act as he sees fit, limited only by the like liberty of each other man.[5] The autonomy principle is said to entail, as an initial matter, the right to one's person – with associated rights of bodily integrity and locomotion.[6] The principle also entails a right to own property and to do with it what one pleases.[7] Spencer then deduces rights to enter exchanges and to make gifts.[8] These rights, Spencer claims, are implied by the entitlement to do whatever one likes with one's property, or else can be directly derived from the autonomy principle: so long as exchanges and gifts are voluntary, they are compatible with the liberty of the parties concerned and so must be respected.

Notoriously, Spencer proceeds to argue in the name of liberalism, autonomy and freedom of contract against just about every state intervention in the domestic economy, opposing Victorian laws ameliorating the conditions of factory workers and chimney sweeps, providing for mine inspections, and requiring minimal standards of hygiene in victualling.[9] Few liberal theorists of contract law today endorse these extreme laissez-faire positions. Indeed, theorists today tend to be officially agnostic about how far contracting should go unimpeded by state intervention. They seek merely to give a theoretical rationale for the practice of contracting to the extent that it is allowed to flourish unimpeded. However, contemporary liberal contract theorists continue to echo Spencer in constructing theories based on the same ideological trinity, linking liberalism, autonomy and contract.

The leading figure today is of course Charles Fried, the son of Czech émigrés who would later serve in the Reagan administration and to whom, in the late 1970s, "the liberal theory of contract and the liberal theory of law in general" seemed to need defending.[10] Fried's defence interweaves various strands but he begins with what he tells us is "the liberal ideal".[11] This ideal is based on a "first principle" of respect for autonomy.[12] We must leave other persons "free to make their own lives", "as we are left free to make ours", so that we may each "express our will and expend our powers in the world".[13] Fried then derives from this principle the basic content of private law and contract law in particular.

[5] H. Spencer, *Social Statics, or the Conditions Essential to Happiness specified, and the First of them Developed* (London 1868), at paragraphs 2–3; H. Spencer, *Justice: Being Part IV of the Principles of Ethics* (London 1891), § 27.
[6] Spencer, *Justice*, chs. IX, X.
[7] Ibid., ch. XII.
[8] Ibid., at paragraphs 63, 69.
[9] E.g. H. Spencer, *The Man Versus the State* (London 1884), ch. 1; H. Spencer, *The Proper Sphere of Government* (London 1843). Prompting the famous acerbic remark by Oliver Wendell Holmes, dissenting in *Lochner v New York* (1905) 198 U.S. 45, 75: "The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."
[10] C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA 1981), 149, n. 22.
[11] Ibid., at 7.
[12] Ibid.
[13] Ibid.

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The autonomy principle is said to entail, as an initial matter, the rights over our persons and possessions that are protected by the law of tort and property.[14] Moreover, "another fair implication of liberal individualism" is the ability to enter reciprocal exchanges and to make gift promises.[15] If these transactions are voluntary they infringe nobody's rights and since they expand the range of individual freedom they must be allowed.

Fried restored liberal, autonomy-based theories of contract to a commanding position in the legal academy and some of the most influential work in contract theory from the 1980s to today pursues the same broad line of approach.[16] The current state of the literature is summed up thus by one leading figure: "If there still is one thing common to all 'liberal' theories, it is their focus on the intricate connection between contract and personal autonomy."[17] Even critics of liberal contract theories often focus on the role of individual autonomy. For instance, at the outset of his epic *Rise and Fall*, P.S. Atiyah invites us to reconsider the assumption that contract law "rests upon a belief in the traditional liberal value of free choice".[18]

While older autonomy theories tended to deploy relatively minimal conceptions of autonomy – conceived mainly as a sort of sheer capacity for the exercise of choice, to be protected in a negative manner through duties of non-interference[19] – more recently other liberal contract theorists have deployed more elaborate conceptions of "personal autonomy".[20] Theorists such as Hanoch Dagan and Dori Kimel insist that a truly autonomous person does not merely enjoy unimpeded arbitrary choice, but actively shapes the course of their life by making authentic selections from a range of valuable life options. The range of available options must be fairly extensive and include a variety of valuable long-term projects, relationships and other forms of social participation. Thus, these theorists supplement or build out the ideal of autonomy, incorporating into that ideal various forms of activity and community that, many of us think, make life worth living.

The elaborated conception of personal autonomy can then be applied to contract law. There would seem to be a natural fit. After all, contract law seems to expand the range of individual choice dramatically – since with this facility you can do many things you could not easily do otherwise

[14] Ibid.
[15] Ibid., at 8.
[16] E.g. R. Barnett, "A Consent Theory of Contract" (1986) 86 Columbia Law Review 269; J. Kraus, "The Correspondence of Contract and Promise" (2009) 109 Columbia Law Review 1603, 1608–09.
[17] D. Kimel, "Book Review of Hanoch Dagan & Michael Heller, *The Choice Theory of Contract*" (2019) 78 Cambridge Law Journal 202, 203.
[18] P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford 1979), 6.
[19] Important nuances in Fried's view are noted below.
[20] Drawing on J. Raz, *The Morality of Freedom* (Oxford 1986), ch. 14. See especially D. Kimel, *From Promise to Contract: Towards a Liberal Theory of Contract* (Oxford 2003); H. Dagan and M. Heller, *The Choice Theory of Contract* (Cambridge 2017).

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(e.g. buy a car, get a job, run a business and so on). To be sure, many contracts are utterly mundane and indeed trivial, but even those arguably facilitate broader patterns of behaviour that may be significant for our overall life story.

Despite important differences, then, leading contemporary theorists pursue recognisable variations on the intellectual project bequeathed to us by Herbert Spencer and his fellow classical liberals: they seek to defend a liberal view of contract by working out and applying a conception of individual autonomy.

III. Autonomy Theories of Contract: Three Problems

Autonomy theories of the common law of contract face many challenges. This article will focus on three that are fundamental and point us towards an alternative view of contract. At this stage the article merely develops a negative case against autonomy theories; it will later make a more positive case for an exchange theory.

A. Transaction Types

Much of the law of contract is composed of rules governing particular "transaction types".[21] Here are some prominent contractual types in English law (similar lists could be created for other jurisdictions):

Agency	Arbitration	Apprenticeship	Auction
Bailment	Banking	Bill of exchange	Carriage
Charge	Charter party	Common calling	Construction
Consumer credit	Consumer sale	Derivative	Distribution
Doctor–patient	Employment	Franchise	Gambling
Hire purchase	Insurance	Joint venture	Lease
Letter of credit	Licence	Loan	Long-term supply
Marriage	Merger/acquisition	Mortgage	Package holiday
Partnership	Pledge	Procurement	Restraint of trade
Restrictive covenant	Sale of goods	Sale of land	Salvage
Schooling	Settlement	Solicitor-client	Supply of service
Suretyship	Surrogacy	Telecommunications	Tender
Timeshare	Website terms		

This list of 50 is far from exhaustive. Relatedly, many of the listed types could be divided into subtypes. For example, a contract of *bailment* (where one person looks after another's property) may take forms such as *custody for reward* (e.g. paid warehousing), *hire for use* (a rental car), *work and labour* (laptop repair). *Insurance* contracts may be subcategorised by

[21] Karl Llewellyn's term, e.g. K. Llewellyn, "What Price Contract?" (1931) 40 Yale Law Journal 704, 710; see, at various points, also Dagan and Heller, *Choice Theory*.

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insurable interest: *life*, *property*, *liability*, *marine*. Contracts of *carriage* may be carried out over *land*, *sea* or *air*.

The transaction types are pervasive in contract law and practice. It may be conjectured that the vast majority of contracts fall into one or more recognised types. (A given contract may of course partake of multiple types – for instance a corporate *merger* may provide for a *loan* with accompanying security such as a *charge* and may contain an *arbitration* clause.) Some of the types are very common transactions – the list above covers most of the ways one can transact with respect to goods or land and many important contracts for services and finance.

Each type is a dense cluster of legal norms. Some of these are definitional or structural. For instance, a *sale of goods* is defined in English law as "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price"[22] and a substantial body of case law elaborates that definition's elements. Other legal norms prescribe the transaction type's legal implications. So, in a sale of goods contract, the law supplies various terms (some mandatory and some default) requiring that the seller promise he has title to the goods and that they are of satisfactory quality and fit for their intended purpose.[23] An elaborate legal scheme determines when ownership of the goods passes from seller to buyer and who bears the risk of loss or damage.[24] Other rules address delivery, examination, rejection, repair and a host of other issues that characteristically arise when people exchange goods for money.

The norms of contract types come from at least four key sources – each of which, to varying extents, crystallise industrial customs, practices and compromises concerning how various types of exchange are and ought to be carried out. At the outset, it should be recognised that the norms stemming from each of these sources differ significantly in many respects. For example, some tend to be merely default and others mandatory. In the discussion below, the various norms are drawn together not to deny their differences but to illustrate one key feature they tend to have in common: their content is very often not traceable to the wills of individual contracting parties, but rather to industrial custom and regulation.

The first source of norms is legislation. Some contractual statutes largely codify existing commercio-legal practices – famous English examples are great nineteenth century statutes still on the books such as the Bills of Exchange Act 1882, the Partnership Act 1890, the Sale of Goods Act 1893 and the Marine Insurance Act 1906. Other legislation reforms

[22] Sale of Goods Act 1979, s. 2(1).
[23] Ibid., ss. 12–14.
[24] Ibid., ss. 16–26.

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existing practices and implements various public policy decisions and trade-offs that bear on the contractual types. The most cynical legislation, to be sure, is designed purely to advance the interests of industry players.

A second source of the norms of contract types is official or semi-official industry conventions, as established by business groups, NGOs or governments. These conventions may be mandatory, default or opt-in. Thus, a contract of *carriage by air* across national borders will likely fall under the Montreal Convention of 1999, convened by the International Civil Aviation Organisation, which regulates the transport of passengers, baggage and cargo, fixes the compensation payable for injury and damage, limits exclusions of liability, and provides for ticketing, flight delays and cancellations. A *merger* or *acquisition* of a listed UK company is subject to the City Code on Takeovers and Mergers, which structures bidding wars, requires the timely release of information, and controls terms such as break fees. A *letter of credit* may be governed by the International Chamber of Commerce's "Uniform Custom and Practice 600" standard, which defines the roles of the banks involved in issuing the letter and what constitutes a complying presentation of documents that will compel payment.

Third, the common law is an enormous, evolving repository of norms of contract types. The common law defines and distinguishes many such types. For example, it specifies how a *lease* (a grant of property for a term at rent with exclusive possession) differs from a mere *licence* (with no exclusive right to control the property); distinguishes subtypes of security interest such as *pledges* and *mortgages* and various kinds of *charge*; and sets out detailed tests for whether someone is an *employee* or an *independent contractor* (as opposed to some other type of *worker*). Common law judges often have to define and distinguish types when they confront questions of "characterisation", deciding what category a given contractual deal falls into because upon this turns some important legal consequence.[25] English judges say they will not let the "label" parties may have chosen for their contract determine its characterisation; instead they will look to the "substance" or "reality".[26] If, for example, the parties create a lease, it will not matter that they label it a licence – just as "[t]he manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer … insists that he intended to make and has made a spade".[27]

[25] J. Allsop, "Characterisation" in S. Degeling, J. Edelman and J. Goudkamp (eds.), *Contract in Commercial Law* (Pyrmont, NSW 2016). This process may be more prominent in civilian systems; see B. Nicholas, *The French Law of Contract*, 2nd ed. (Oxford 1992), 47–50, 57; Dagan and Heller, *Choice Theory*, 141–42, nn. 7–8.

[26] E.g. *Welsh Development Agency v Export Finance Co. Ltd.* [1992] B.C.C. 270, 300 (C.A.): "substance, truth, reality, genuine are good words; disguise, cloak, mask, colourable device, label, form, artificial, sham, stratagem and pretence are 'bad names'" (Staughton L.J.).

[27] *Street v Mountford* [1985] 1 A.C. 809, 819 (H.L.) (Lord Templeman).

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The common law also supplies prescriptive rules for each contract type. Some are mandatory or not easily modified and, relatedly, are not "pure" contract law but an admixture of property, tort, equity or other sources. For instance, *bailments*, *sales of goods* and *sales of land* lie at the intersection of contract and property law and may generate tort liability. *Banking* contracts may come with tort and fiduciary obligations. Common law judges supply rules for contract types by "implying" terms and the implication may be based on the judge's view of how a certain type of deal customarily works or what is needed for it to function well,[28] drawing on established understandings of "relationships which are of common occurrence", "[s]uch as the relationship of seller and buyer, owner and hirer, master and servant, landlord and tenant, carrier by land or by sea, contractor for building works, and so forth".[29] For example, the English master–servant or *employment* contract has been held to contain implied terms requiring the servant to be obedient, faithful, discreet, skilful and careful, and the master to provide work, money, references, privacy and safety.[30]

The fourth and final source of norms to be highlighted here is *boilerplate*. Consumers are painfully aware that lengthy contractual standard forms are often inflicted upon them (especially online), though it is questionable to what extent these ought to be legally enforceable.[31] Much non-consumer contracting also occurs on standard forms, which are often promulgated by industry bodies. Hence a *salvage* contract is likely to appear on "Lloyd's Standard Form of Salvage Agreement – No Cure No Pay", which specifies the wreck to be salved and the place of safety to which it will be taken, requires the salvor to use "best endeavours" and provides for remuneration to be determined by a Lloyd's panel in London. Someone seeking to *sell land* with a residential house on it will almost certainly use the Law Society of England and Wales' "Standard Conditions of Sale (Fifth edition)". A business wanting to *carry goods by land* across England may use the "Road Haulage Association Conditions of Carriage" or "National Rail Conditions of Carriage". Even where no official industry form exists, customary industrial norms enter contracts through lawyers' and businesspersons' use of "precedent" transactions. Rather than negotiating or drafting a contract from scratch one can copy or adapt clauses from past transactions and so a clause

[28] Terms implied-in-law "by custom" or "by class or type".

[29] *Shell (UK) Ltd. v Lostock Garage Ltd.* [1976] 1 W.L.R. 1187, 1196–97 (Lord Denning M.R.), quoted in T. Rakoff, "The Implied Terms of Contracts: Of 'Default Rules' and 'Situation-Sense'" in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law* (Oxford 1995), 196.

[30] H. Beale (ed.), *Chitty on Contracts*, 35th ed., vol. 2 (London 2023), ch. 40. The understanding of a contract type may also influence interpretation of express words. E.g. *Investors Compensation Scheme Ltd. v West Bromwich Building Society* [1998] 1 W.L.R. 896, construing a *settlement* scheme based in part on assumptions about what settling parties seek to achieve.

[31] M. Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton, NJ 2012).

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initially drafted for one contract may appear in almost all subsequent deals of the same type. Legal economists devote substantial attention to this form of path dependency.[32]

This brief tour of some sources of the norms of contract types shows that these norms are very often not generated by the decisions of individual contracting parties. Individual parties largely sign up for transaction types whose content is established independently of them.[33] The content is supplied by a variety of other actors and processes and tends to reflect (whether in statute, convention, common law or boilerplate) industrial customs, compromises and prescriptions associated with standardised forms of commercial exchange. None of this is to deny the extent to which commercial practices may be developed or reformed – thereby generating new rules or conventions and eventually customs. Nor is to deny that there is often significant variation in contractual practice even within particular industries. Finally, nor is it denied that individual contracting parties may modify existing contractual forms and sometimes even invent new ones (though we should not overestimate the extent to which this occurs). The key point here is merely that a substantial swathe of the law of contract is best understood as reflecting industrial custom and regulation and cannot be explained by a theory based on the idea of individual autonomy.

Or at least, this swathe of contract law cannot be explained by a theory based on a relatively minimal conception of autonomy. The leading contemporary liberal theorist, Charles Fried, asks us to view contracting parties as autonomous individuals who "work … their wills in the world".[34] However, the content of the contract types is not generally supplied by the parties' wills.[35]

More elaborate autonomy theories might seem better equipped to account for the contract types. As we have seen, these theories hold that autonomous individuals ought to have a diverse range of lifestyle options to choose among when authoring their life stories, including various valuable projects and relationships. Perhaps the contract types enhance personal autonomy by providing a diverse range of transactional options. The "telos" of the various contract types, it might be said, is personal autonomy.[36] In recent years Hanoch Dagan together with various

[32] A literature spawned by M. Kahan and M. Klausner, "Path Dependence in Corporate Contracting" (1996) 74 Washington University Law Quarterly 347.

[33] Dagan and Heller, *Choice Theory*, 2–3.

[34] Fried, *Contract as Promise*, 8.

[35] Even if parties willingly sign up for that content. From the perspective of Fried's theory, the rules of the contract types are largely a presupposed background against which individuals exercise their wills. Indeed, even if the contract types' content was supplied by the contracting parties' wills (perhaps invented afresh each time two parties contracted!) a minimal autonomy theory would have nothing to say about this content beyond observing it was willed.

[36] H. Dagan and M. Heller, "Why Autonomy Must Be Contract's Ultimate Value" (2019) 20 Jerusalem Review of Legal Studies 148, 148: "Autonomy, rightly understood, is the telos of contract."

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co-authors has powerfully advanced this view. Dagan argues that contract law should provide a range of transactional options in each sphere of human life – in particular, the spheres of "commerce", "work", "home" and "family".[37] There should be numerous options in each sphere, though not so many as to overwhelm potential contractors.[38] The options must differ significantly, so as to enhance the range of choice, but not differ so much that they fail to be genuine alternatives.[39]

Yet, the contract types we have discussed (whether considered individually or as a set) are not oriented by any guiding ideal of personal autonomy: they are not designed to ensure that individuals have an optimal range of life options to select among. If the contract types have a "telos" it is not personal autonomy but the industrial custom of exchange. The actors and processes that shape the types include businesses, their lawyers, industry bodies, lobby groups and non-governmental organisations. Their actions are influenced by a congeries of commercial, legal, political and historical factors, including for example lawyerly habits, the efficiency and profitability of industry practices and horse trading in international diplomacy. When states legislate in the contractual arena, they often codify existing mercantile practice; reformist legislation is influenced by multifarious policy considerations, not to mention pork barrel politicking. Likewise common law judges tend to adopt the customary understandings of relevant industries. When judges do actively tinker with transaction types they are motivated by quite heterogeneous concerns (e.g. the constraints imposed by statutory schemes and bodies of precedent and the desire to address social problems such as exploitation of the vulnerable or the cost of administrative red tape).[40] None of these actors or processes, then, are deliberately or inadvertently promoting personal autonomy – a satisfactory range of lifestyle options. The relevant actors are crystallising industry customs and compromises concerning how certain types of exchange are to be carried out.[41]

[37] Dagan and Heller, *Choice Theory*, 5.

[38] Ibid., at 127–28.

[39] In other words, the options must be "partial functional substitutes"; ibid., at 106–07. James Penner questions this notion in J. Penner, "Taking Raz Seriously: On the Value of Autonomy and its Relation to Private Law" in P. Miller and J. Oberdiek (eds.), *Oxford Studies in Private Law Theory*, vol. II (Oxford 2022), 99.

[40] Prince Saprai, "Moving Beyond Promise" (2019) 20 Jerusalem Review of Legal Studies 104, 114–16.

[41] Indeed, even if the content of the contract types were adopted by a legislator designing a contract law to further personal autonomy – i.e. a good range of lifestyle options – this would not explain why certain options (e.g. sales, carriage, salvage, insurance) rather than others deserve the law's attention. The personal autonomy theory of contract presupposes rather than explains the relevant legal content (see note 35 above). Of course, an autonomy theorist could respond that they do not seek to explain the normative content of contract law but are happy to presuppose this and propose a new rationale for it. See H. Dagan, "Two Genres of Interpretive Legal Theories" in E. Fox-Decent, J.C.P. Goldberg and L. Smith (eds.), *Understanding Private Law: Essays in Honour of Stephen Smith* (London 2025). The present article pursues a more explanatory theory.

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B. Consideration

Another challenge to autonomy theories comes from the common law of contract's consideration doctrine, according to which parties' informal choices are legally irrelevant unless they choose to enter an exchange or bargain. There is no enforceable commitment if one party merely promises to bestow a gift or other benefit without any quid pro quo. That is clearly problematic for autonomy theories. If an individual's autonomy is enhanced by allowing her to commit to an exchange, it is surely also enhanced by allowing her to make gratuitous or altruistic commitments. As we have seen, autonomy theorists such as Spencer and Fried embrace this conclusion: they claim that both exchange and gift commitments should be enforced.

How can autonomy theorists account for the common law's apparently myopic focus on exchange? Two main strategies are available, but each is less than fully satisfactory. First, one can argue that the consideration doctrine is an error. Hence Fried famously calls for its abolition.[42] Yet, a theory of the common law of contract, even if it does not fully endorse consideration, should be able to say something about why it has been such a central and enduring legal feature.[43] It is perhaps the most intensely scrutinised contractual doctrine and has survived (if not entirely unscathed) recurrent attempts at abolition.[44] It has survived despite lawyers recognising that it sometimes produces unfairness and even absurdity, necessitating frequent judicial evasions and the creation of exceptions. Given all this, the doctrine presumably has some underlying attraction – which remains unaccounted for if we merely pursue an autonomy theory to its logical conclusion and claim consideration is an error.

In an effort to show that the consideration doctrine could not have any attraction whatsoever, Fried engages in a rather uncharacteristic exercise of legal deconstruction. He picks 10 allegedly incompatible American consideration decisions and seeks to show that they do not embody any coherent conception of exchange. However, many of Fried's arguments presuppose an intuitively appealing conception of exchange on the basis of which one can impugn the decided cases. (For example, Fried criticises US courts' refusal to find consideration where a literary agent, in return for six months' exclusivity, promises to add an author's manuscript to the list of works the agent may, but need not, promote. Fried plausibly asserts there is a bargain here because "the author has

[42] Fried, *Contract as Promise*, ch. 3.

[43] Of course, other systems of contract law do not have any precise equivalent of the doctrine of consideration. This article does not presume that consideration is a necessary feature of any contract law, only that it is an important feature of the common law which a theory of this body of law should try to explain.

[44] P. Benson, "The Idea of Consideration" (2011) 61 University of Toronto Law Journal 241, 242.

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obtained something he wants – namely, the *chance* that this agent might peddle his manuscript".)[45] Criticising America's realisation of the consideration doctrine by appealing to a more intuitively plausible conception of exchange hardly proves the doctrine irredeemably incoherent.

Alternatively, autonomy theorists can argue that consideration is not a mere error but a proxy for other concerns. Lon Fuller explored this strategy in his 1941 article which is still the leading treatment.[46] He suggests that the provision of consideration may indirectly protect party autonomy by functioning as the equivalent of a formality – akin to a requirement of sealing or notarisation. The supply of a quid pro quo may (1) "evidence" the parties' intention to make a legally binding commitment, (2) "caution" or alert the parties to the possibility of incurring liability and (3) "channel" legal analysis by supplying a characteristic mark of contractual enforceability.

It is well known that this line of argument faces substantial difficulties because consideration does not serve Fuller's formal functions particularly well.[47] From an evidential perspective, the alleged provision of consideration in the form of, say, a mere oral promise is of dubious probative value. Many parties will not be cautioned or alerted to the possibility of binding legal relations merely because they enter an exchange. Rather than smoothly "channelling" legal analysis, consideration probably does more to complicate it and inspire legal sleight of hand than any other contractual doctrine.

But there is a deeper point to note about Fuller's argument. Let us assume *arguendo* that the provision of a quid pro quo does to some extent serve the evidentiary, cautionary and channelling functions. How could that be the case? Only, it is submitted, because of the normative salience and significance in our society's commercial and legal mores of exchange. If the provision of a quid pro quo does somehow evidence parties' serious commitment, then that must be because people generally make serious commitments when they enter exchanges. Similarly, the provision of a quid pro quo will caution or alert potential contracting parties only if it is generally understood that an exchange is the kind of transaction that tends to be legally binding. Finally, the "channelling" function will be well served only if exchange is a salient and readily graspable social form. Fuller's entire argument presupposes that exchanges are significant forms of social interaction likely to attract legal enforceability.[48]

[45] Fried, *Contract as Promise*, 31.
[46] L. Fuller, "Consideration and Form" (1941) 41 Columbia Law Review 799.
[47] E.g. D. Markovits, "Contract and Collaboration" (2004) 113 Yale Law Journal 1417, 1479–81. Fuller himself acknowledges many of the difficulties.
[48] Fuller also proposes that individual autonomy is a "substantive" (as opposed to "formal") policy underlying the doctrine of consideration. Notably, to make this argument Fuller must assume that individual autonomy is most appropriately legally protected when exercised in the context of an

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Thus, there is good reason to doubt that an error theory (such as Fried's) or a proxy theory (such as Fuller's) can satisfactorily account for the doctrine of consideration. Neither type of theory fully explains why the common law of contract should be so preoccupied with exchange. Indeed, both the error and proxy arguments by their very nature assume that the preoccupation with exchange should not be taken at face value. Furthermore, in their efforts to side-line the law's apparent preoccupation with exchange, contract theorists tend to make telling presuppositions about the intuitive resonance and socio-legal significance of exchange.

C. Contractual Obligation

A party who enters a contract is not free to change her mind but is bound to the other party to perform. How is this compatible with individual autonomy?

Two connected features of contractual obligation need explaining here. The first is the "normative baseline" established by a contract.[49] The law generally holds a contracting party to her initial choice to enter a contract and disregards her subsequent choice to resile. Of course, one can quibble over exactly how strict a contractual obligation is – arguably, doctrines such as frustration and mistake, and limits on specific performance, ameliorate the obligation's stringency.[50] Still, it can safely be said that contract law prioritises a party's initial choice to enter the deal over her later choice to resile in a weighty (if not absolute) manner. The problem is that, from an autonomy perspective, it is unclear why this should be so. Indeed, esteem for autonomy should prima facie lead us to respect a party's later choice and allow her to resile – as that would respect her current wishes, which supersede her earlier ones.

It might be objected that almost any exercise of autonomous choice is inevitably constraining. For example, if you devote your free time to a musical instrument, you thereby forego the chance to hone your athletic skills, depriving yourself of the option to join elite athletic contests. If you use your land to cultivate a rose garden, you can no longer turn it into a wildflower meadow. These are the inevitable consequences of the exercise of autonomy in a finite world. Likewise, one might argue, the choice to enter a contract inevitably closes off certain options in the

exchange: "In modern society the most familiar field of regulation by private autonomy is that having to do with the exchange of goods and services"; see Fuller, "Consideration and Form", 807.

[49] P. Benson, "The Idea of a Public Basis of Justification for Contract" (1995) 33 Osgoode Hall Law Journal 273, 289.

[50] D. Kimel, "Personal Autonomy and Change of Mind in Promise and Contract" in G. Klass, G. Letsas and P. Saprai (eds.), *Philosophical Foundations of Contract Law* (Oxford 2014), 114; H. Dagan and M. Heller, "Choice Theory: A Restatement" in H. Dagan and B. Zipursky (eds.), *Research Handbook on Private Law Theory* (Cheltenham 2020); H. Dagan and O. Somech, "When Contract's Basic Assumptions Fail" (2021) 34 Canadian Journal of Law and Jurisprudence 297; H. Dagan and M. Heller, "Specific Performance" (2023) 98 Notre Dame Law Review 1323.

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future. However, this objection assumes that contractual obligation is inevitably constraining in the same way as constraints of, say, time, space or natural resources. Yet there is no factual inevitability – instead there is an open normative question – about whether a society should have an institution of contract that deprives those who choose to enter exchanges of the ability to change their minds. If we are truly committed to allowing individuals to act autonomously, this institution appears prima facie problematic.

The second feature of contractual obligation that needs explaining is its "relational" character.[51] The obligation is owed *to the other party* to the contract – who is entitled to demand performance or else claim damages for breach. A contractual obligation is not, or at least not centrally, a self-regarding duty that a party owes to herself, nor one she owes to all persons or society as a whole.

Autonomy theorists grappling with the phenomenon of contractual obligation can pursue two main strategies. First, they can appeal to the value of having a general convention, practice or rule that contracts bind. It seems plausible that a contract is a conventional device that allows individuals to assume binding obligations and that the convention is valuable precisely because it furthers individual autonomy – by providing a facility that people can use to achieve their sundry ends (e.g. to buy cars, get jobs, run businesses and so on).

However, the convention strategy faces well-known difficulties – at least, for any theorist who takes seriously the perspective of the autonomous individual. Among other difficulties, a convention generates neither the right normative baseline nor a sufficiently relational obligation. The obligation not to violate a convention is not as categorical as a contractual obligation. Indeed, just because a convention is admittedly valuable it does not follow that an autonomous individual must not violate the convention in a particular case. Even if it is generally valuable to have a convention that contracts bind, it remains an open question whether I should breach the particular contractual promise I have made, say, to mow your lawn this weekend. It is far-fetched to claim that any breach will always impair the value of the convention – especially if there is little potential for the breach to become widely known. Moreover, even if the convention were to become less valuable, that would merely provide a reason of rational self-interest not to breach – which is the wrong kind of reason because it is insufficiently "relational". My considerations of rational self-interest cannot explain why I owe a duty to perform *to you*, my contractual counterparty.

[51] Benson, "Public Basis", 289.

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It may be tempting to invoke a "fair play" principle here: surely those individuals who benefit from a valuable convention, such as contracting, are morally obliged not to abuse it?[52] Yet such a principle faces the same difficulties we have already noted. The principle seems incapable of producing the right kind of normative baseline. Even if everyone does benefit from a convention such as contracting, it does not follow that everyone can be mandatorily obliged to honour the convention. (By way of analogy, that I benefit from a local radio station at which all my neighbours volunteer does not entail that I must volunteer myself.)[53] In any event, one would owe any duty of fair play to all the participants in the convention rather than to a particular person, the contractual counterparty. A more relational account is required.

The second main strategy available to autonomy theorists grappling with the problem of contractual obligation is to supplement or build out their conception of autonomy, incorporating into it some idea that seems capable of accounting for contractual obligation. Disavowing a minimal conception of autonomy as a sheer capacity for arbitrary choice – changeable from moment to moment at the individual's whim – theorists can instead argue that true respect for autonomy requires consideration of matters such as: individuals' *long-run interests*; the need for *continuity of the self* over time and *continuing adult responsibility*; the importance of *projects* or *plans*; and the value of being able to change one's *normative situation*. All of these ideas are hinted at by Charles Fried but more fully developed in recent scholarship that self-consciously deploys more elaborate conceptions of "personal autonomy".

Yet this strategy too produces less than satisfactory results. For one thing, the supplemented conception of autonomy is unlikely to generate the right normative baseline. Consider the claim that "the restrictions involved in [contracting] are … undertaken just in order to increase one's options *in the long run* and thus are perfectly consistent with the principle of autonomy".[54] The problem is that a choice to resile from a contract may also increase one's options in the long run (as when one quits a stultifying job). So, looking to the long run does not entail that we should set the normative baseline invariably at a party's initial choice to contract rather than respecting her later choice to resile. Likewise, the need to respect the "*continuity of the self*" over time[55] does not mean we

[52] H. Hart, "Are There Any Natural Rights?" (1955) 64 Philosophical Review 175, 185; J. Rawls, "Legal Obligation and the Duty of Fair Play" in S. Hook (ed.), *Law and Philosophy: A Symposium* (New York 1964).

[53] R. Nozick, *Anarchy, State, and Utopia* (New York 1974), 93. For further discussion of this kind of argument, see e.g. A. Simmons, "The Principle of Fair Play" (1979) 8 Philosophy and Public Affairs 323; A. Ripstein, *Force and Freedom* (Cambridge, MA 2009), 185–90.

[54] Fried, *Contract as Promise*, 14 (emphasis added). Also, it is doubtful one always contracts to increase long-run options (consider a contract for, say, specialised employment).

[55] Ibid., at 14, 20–21.

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must always hold the self to a prior choice over a current one.[56] A self (especially an autonomous one) may be able to revise their choices while continuing to be the same self. While one might worry that it is "*infantilising*" to release an autonomous agent from her initial choice to contract,[57] it is surely sometimes more infantilising to hold a responsible adult to a choice made in the past and refuse to allow any change of mind. Again, this concern suggests a normative baseline more variable than contract law's.

Some contemporary autonomy theorists emphasise the importance of what may be compendiously labelled *projects* – long-term commitments, activities and special relationships that bear on "fundamental aspects of our lives".[58] Others develop the somewhat more prosaic idea that "a contract is a *plan*", noting that planning is crucial for autonomous self-determination.[59] Yet neither plans nor projects create the same normative baseline as a contract. It is a familiar fact of life that plans change – even the "best laid" ones may "go out the window", etc. In this respect, plans are closer to mere intentions than contractual obligations. Likewise, we can give up on or revise our projects (e.g. academic papers) without being accused of any breach. Indeed, a party choosing to resile from a contract might do so in pursuit of a substantial project or plan. A contract law genuinely concerned to respect plans or projects should excuse non-performance. Finally, note that the claim that autonomous individuals should have the power to shape the norms that apply to them – to change their obligations or "normative situation"[60] – speaks equally in favour of allowing them to resile from their contracts – which would after all allow them to shape the norms to which they are subject.[61]

In any event, all of the supplementary ideas we have considered – the value of long-run options, the continuity of the self, adult responsibility, projects and plans and the power to change one's normative situation – remain problematic because they are not properly "relational". An obligation to respect any of these values might involve some sort of self-regarding duty on the part of the autonomous individual to himself. There could conceivably be a duty on the part of the relevant authorities to police the individual's conduct. But any obligation here is not owed to another particular person.

[56] P. Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory" (1989) 10 Cardozo Law Review 1077, 1116.
[57] Fried, *Contract as Promise*, 14, 20–21.
[58] Kimel, "Personal Autonomy", 97–100.
[59] H. Dagan, "Autonomy and Contracts" in M. Chen-Wishart and P. Saprai (eds.), *Research Handbook on the Philosophy of Contract Law* (Cheltenham 2025) (emphasis added).
[60] E.g. Kimel, "Personal Autonomy", 100.
[61] One might object that this would undercut the very possibility of obligations and so of persons shaping them. But one can have an obligation that subsists until he takes steps to call it off. C. Molina, "Promises, Commitments, and the Nature of Obligation" (2023) Journal of Ethics & Social Philosophy 59, discussing e.g. romantic engagements. Allowing a party to resile merely undercuts the kind of obligation that appears in contract law.

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One could try to overcome these difficulties by tinkering with the various supplementary ideas we have considered.[62] For example one could try to describe a special kind of "project" or "plan" that has exactly the same normative weight as a contractual obligation (and is perhaps even subject to the same defences, such as frustration and so forth). One could also try to give one's favoured supplementary idea a more relational cast. For instance, a contract might be characterised as not merely a plan, but a *joint* plan.[63] Perhaps a sufficiently clever theorist could build into their conception of autonomy a supplementary idea with exactly the right normative weight and relational cast to match that of a contractual obligation. However, it should be clear by now that such a theorist is effectively building the very idea of a contractual obligation into a supposed conception of autonomy.

Such theoretical moves also render the appeal to "autonomy" misleading. Whatever else it may mean, "auto-nomy" surely involves some form of individual self-governance or self-authorship. A theory incorporating a supplementary normative idea along the lines of an "irrevocable joint plan" or a "binding relational project" is no longer an autonomy theory in any familiar sense.[64]

IV. An Exchange Theory of Contract: Three Solutions

An exchange theory of contract can account for the three key features of the law that trouble autonomy theories.[65]

A. Contract Types

On the particular version of an exchange theory this article will develop, the various customary types of exchange – sales, leases, employments, pledges and so forth – are the basic stuff of contract law. They are important substantive relationships the law values and upholds.[66]

To say why each contract type is important and could be regarded as valuable, we would have to consider each in turn and say some rather obvious things about it. To illustrate, consider a sale of goods. Goods (roughly, things you can touch and carry off as they are not fixed to

[62] My colleague Hugh Collins calls this "playing the autonomy game".

[63] Dagan, "Autonomy and Contracts", 13.

[64] Fried also associates contractual obligation with "trust"; see Fried, *Contract as Promise*, 14–17. To make the association one must conceive of a peculiar form of "trust" that suspiciously resembles contractual obligation. In any event, a theory appealing to trust is to that extent no longer a pure autonomy theory.

[65] Influential treatments of exchange theories include C. Hamson, "The Reform of Consideration" (1938) 54 L.Q.R. 233; R. Pound, "Promise or Bargain" (1959) 33 Tulane Law Review 455; J. Dawson, *Gifts and Promises* (New Haven 1980), 3–5, ch. 4; M. Chen-Wishart, "In Defence of Consideration" (2013) 13 Oxford University Commonwealth Law Journal 209.

[66] Compare Aristotle, *Nicomachean Ethics*, R. Crisp (trans. and ed.) (West Nyack 2014), bk. V, 1131a: "such transactions as sale, purchase, usury, pledging, lending, depositing, letting"; D. Phillips, *The Law of Ancient Athens* (Ann Arbor 2013), ch. 10.

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land)[67] are hugely important in our society and have been for a long time. Most of us spend much of our lives using them or trying to acquire them and many earn their livelihoods producing or trading them. In our society money is also hugely important, not least because it is a nigh-universal medium of exchange that can be used to acquire almost anything. Consequently, it is not uncommon that one person wants to receive goods from another person, who is willing to provide them in return for money. So it is unsurprising that the law recognises and upholds "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price".

Or consider the pledge: a transaction in which one person takes possession of a good belonging to another so that the first can have recourse to the good as security (e.g. by selling it and keeping the money) if she does not receive some other satisfaction that is due, such as the repayment of a loan.[68] The importance and potential value of this transaction should be obvious once we connect it to familiar facts of social life. People sometimes want to loan money to others, especially in order to profit by being repaid with interest. However, it is not always easy to gauge others' creditworthiness or trustworthiness. It can be relatively easy to value a good and one can often be confident the good can be sold quickly to realise its value.

In this way, we can bring out the significance of each transaction type by reminding ourselves of the character of the transaction and situating it within the context of our broader way of life, noting the judgements of value it instantiates and the practices in which it plays a part. This brings out why one might think each transaction type is "part and parcel of an enormous amount of human activity and hence of human good".[69] Certainly we can account for the transaction types without contending that each one – let alone the overall set – is oriented towards the promotion of individual autonomy. We need not be troubled by the fact that the contract types evolve through a rather haphazard process in which industrial customs are formed and compromises struck, establishing norms – crystallised in sources of law such as legislation, convention, common law and boilerplate – for how various types of exchange are to be carried out.

[67] Sale of Goods Act 1979, s. 61.
[68] J. Wigmore, "The Pledge-Idea: A Study in Comparative Legal Ideas (I)" (1897) 10 Harvard Law Review 321.
[69] G.E.M. Anscombe, "On Promising and Its Justice, and Whether it Needs Be Respected In Foro Interno" (1969) 3 Crítica: Revista Hispanoamericana de Filosofia 61, 74.

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B. Consideration

Systems of contract law tend to feel practical and intellectual pressure to go beyond a mere list of various substantive relationships the law will uphold and to articulate a more general approach – to supply principles of demarcation that distinguish contractual relationships from other relationships deserving different legal treatment.[70] Here the common law, notoriously, adopted the doctrine of consideration, articulating the general principle that a contract is an exchange.

The exchange criterion is a not wholly unconvincing way of capturing what certain core contractual types – sales, leases, employments, pledges and others – have in common. At the same time, it must be acknowledged that the exchange criterion is associated with many complexities and difficulties. A theory of contract that failed to acknowledge these would not ring true, given the notoriously problematic status of the consideration doctrine – which, ever since it began to take something like its modern form, has been subjected to intense scrutiny and calls for abolition, riddled with exceptions, and undermined by legal sleight of hand.

For one thing, the consideration doctrine is orbited by companion doctrines that both expand and narrow the range of enforceable transactions. It is not possible here to treat these doctrines conclusively, without giving too short shrift to many existing controversies about their proper role, and indeed about the relevant positive law. However, it will tentatively be suggested that these other doctrines can be understood as compatible with a theory that accords major significance to the exchange criterion as a hallmark of enforceability in the ordinary law of contract.

Historically, and still today in many jurisdictions, parties have been able to make non-exchange transactions enforceable by recording them in a deed or other formal or ceremonial document. At least at one point in the common law's history, the relevant ceremony consisted of a writing being signed, sealed with an imprint of wax or clay, and delivered. Without seeking to develop a full theory of the seal, it is suggested that this type of transaction is best understood as distinct from the ordinary law of contract with its focus on exchange. A legal system that prizes exchange – including casual and rapid exchange – will tend to regard it as inconvenient if all enforceable deals must be recorded in formal documents.[71] The seal is

[70] D. Phillips, "Hypereides 3 and the Athenian Law of Contracts" (2009) 139 Transactions of the American Philological Association 89; M. Eisenberg, "The Principles of Consideration" (1982) 67 Cornell Law Review 640, 640.

[71] *Aylesbury v Wattes* (1382) in J.H. Baker (ed.), *Baker and Milsom Sources of English Legal History*, 2nd. ed., (Oxford 2010) 557: "Do you suppose that a man can always carry his indentures in his purse at Smithfield?" (Skipwith J.), quoted in J. Baker, *An Introduction to English Legal History*, 5th ed. (Oxford 2019), 352. We should not exaggerate the inconvenience. See Llewellyn, "What Price Contract?", 740–41 (arguing speed rather than informality is crucial to commerce); A.W.B. Simpson, *A History of The Common Law of Contract* (Oxford 1975), 90 (sealing a document in the sixteenth century was "no great chore").

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redolent of a different, more formal legal mindset with medieval roots, which accords special significance to solemn ceremonial recordings regarded as definitively settling distributions of property and obligations.[72]

Estoppel liability is in almost all respects highly controversial and varies in important ways across the various estoppels, so that it cannot be addressed here in anything like a conclusive manner. However, there is reason to think that estoppel liability does not undermine the view that ordinary contract law is oriented around exchange. Sometimes, estoppel may be used by judges to impose legal liability where the transaction is essentially a commercial exchange but some technical requirement of contract formation, such as a formality, has not been satisfied.[73] To this extent estoppel liability may reflect the same impulse to enforce exchanges that animates ordinary contract law.

In other cases, estoppel appears to function as a distinct basis of liability. This may occur where there is no clear commercial bargain between the parties – often, in a context such as family life where the striking of bargains is not the usual or appropriate mode of settling matters – but the parties have nonetheless arranged their affairs on the basis of some assumed commitment, so that great disappointment and waste may result if the commitment is retracted.[74] Here it seems significant that some sort of reliance on the commitment, coupled with a finding of inequity, is generally required for liability and that the usual remedy (though much here is murky and controversial) is not the straightforward expectation damages award ordinarily available for breach of contract, but a more flexible award tailored to redress the inequity in the particular case (and which may be oriented towards indemnifying a party's reliance).[75] Given those features of estoppel, it is plausible to understand it as a distinct basis of liability that stands apart from ordinary contract law. Very roughly, estoppel can be viewed as addressing inequity arising from reliance on promises or other commitments, whereas ordinary contract law upholds exchange. Of course, these two bases of liability are potentially in tension with each other. This article takes no stand on whether and how to resolve the tension – to do so, one would need to resolve a further set of very complex debates about the respective merits of exchange and reliance liability (as well as rule-of-law concerns about simplicity and clarity in private law).

Finally, in some jurisdictions consideration is accompanied by a doctrine of "intention to create legal relations". In England, where the doctrine is perhaps

[72] R.C. Backus, "The Origins and Use of Private Seals under the Common Law" (1917) 51 American Law Review 369, contends that public seals arrived in England with the Normans and private seals emerged in the years circa 1150–1250.

[73] *Waltons Stores (Interstate) Ltd. v Maher* (1988) 164 C.L.R. 387 (H.C.A.).

[74] *Guest v Guest* [2022] UKSC 27, [2024] A.C. 833.

[75] See the extensive discussion in *Guest v Guest*; see also e.g. *Central London Property Trust Ltd. v High Trees House Ltd.* [1947] K.B. 130, 135–36 (Denning J.).

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most developed, it arguably amounts in practice to a presumption that commercial transactions are enforceable and that non-commercial (social, familial, romantic, religious, etc.) transactions are not.[76] Viewed in this way, the doctrine supports the view that the common law of contract is especially concerned to uphold exchanges and other cognate commercial relationships. The doctrine ensures that contract law does not enforce some transactions that technically satisfy the requirement of consideration but which upon closer inspection turn out to have a non-commercial character, such as a promise to a family member which, though some benefit or detriment has been provided in return, has gratuitous or altruistic or other social connotations and should not be viewed as merely a quid pro quo exchange. On this view, the intention to create legal relations doctrine is complementary, rather than a rival, to the consideration doctrine.

The precise character of the consideration or exchange requirement is highly contestable. In an illuminating recent article, Jed Lewinsohn claims, finding support in sixteenth-century sources, that it is best conceived of as a reciprocal "payment" relation – whereby what each side provides is regarded as *satisfying the debt* incurred by what the other provides.[77] Lewinsohn contrasts less rigorous conceptions such as the reciprocal "inducement" account of consideration popularised by Oliver Wendell Holmes, according to which each side must provide something *in order to obtain* something from the other. Among other difficulties, Holmes's account is arguably over-inclusive because it embraces conditional gift promises (such as where I promise to give you money on the condition that you spend it on your children's schooling). This article takes no stand on which precise conception of exchange is reflected in the consideration doctrine.[78]

Relatedly, some exceptional types of transaction may be contractually enforceable (in at least some jurisdictions) even though they arguably do not amount to true exchanges because there is no clear quid pro quo. Well-known examples are *letters of credit*, *bills of exchange*, *suretyship*

[76] Of course, there is more to be said here. See e.g. S. Hedley, "Keeping Contract in Its Place – *Balfour v Balfour* and the Enforceability of Informal Agreements" (1985) 5 O.J.L.S. 391; J. Ashton and J. Turner, "A Contemporary Reimagining of the Intention to Create Legal Relations Doctrine" (2022) Journal of Business Law 283.

[77] J. Lewinsohn, "Paid on Both Sides" (2020) 129 Yale Law Journal 690, 708–09, discussing C. St. Germain, *Doctor and Student*, T. Plucknett and J. Barton (eds.), originally published 1539 (London 1974), 228. See *Sharington v Strotton* (1565) 1 Plowden 298, 75 E.R. 454.

[78] Lewinsohn does not suggest that the conception might have changed over time, reflecting a subtly developing exchange ethos. It would not be wholly surprising if, for example, the sixteenth-century conception reflected a morality of mutual recompense (a sort of contractual *lex talionis*), before a broader appreciation of the value of commerce later developed – a favourite theme of moral, economic and political writers in the seventeenth and eighteenth centuries. ("[T]he view that the law of contract is the handmaid of commerce", A.W.B. Simpson notes, "hardly seems to be the sort of idea which sixteenth-century men would find appealing"; Simpson, *History of Contract*, 487–88, 417; Lewinsohn, "Paid on Both Sides", 762.)

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arrangements and (in the US) *firm offers*.[79] Thus, the law of contract admittedly extends beyond exchange in the strict sense to reach transactions that bear some resemblance to exchange and which tend to have a significant commercial aspect.

Also, many types of transaction may be either contractual or not, depending on whether they satisfy the general requirements of contract formation doctrine, especially consideration. Familiar examples include *agencies*, *bailments*, *doctor–patient* relationships and *restrictive covenants*. In the case of some other transaction types, it is eminently contestable whether and to what extent the transaction falls within contract law's purview, even though it may take the form of an exchange – as in *marriage* or *surrogacy*.[80]

In sum, a number of types of transaction and relationship sit at contract's borderlines. This article does not seek to police those borderlines. It maintains that at the heart of contract law lies some concept of exchange (or various conceptions of exchange), embracing some of the most characteristically "contractual" transaction types. It is accepted that contract law extends to some non-exchange transactions, mainly of a commercial character, and that many exchange transactions sit at the borderlines between contract and other areas of law and ethical life.

The theoretical temptation to draw neater borderlines should dissipate if, as Atiyah recommended, we view "contract" as a family resemblance concept.[81] "[T]he various resemblances between members of a family – build, features, colour of eyes, gait, temperament, and so on and so forth – overlap and criss-cross" in various ways.[82] There need be no family trait (or set of traits) that is exhibited by every single member of the family. Let alone a family trait that no *non*-member of the family possesses. Indeed, our conception of the family's traits will tend to be somewhat open-ended, since new members of the family may be born and old ones pass away, changing what the family has in common.[83] Similarly, we should resist the temptation to specify necessary or sufficient conditions for the application of the contract concept and accept a looser account that identifies a set of characteristic traits and tolerates marginal cases.

[79] Contractual *modifications* also notoriously cause trouble for the doctrine of consideration, leading it to be altered or partly abandoned in various common law jurisdictions.

[80] *Hyde v Hyde* (1866) 1 P.&D. 130, 133: "Marriage has been well said to be something more than a contract, either religious or civil – to be an Institution" (Lord Penzance).

[81] P.S. Atiyah, *Essays on Contract* (Oxford 1986), 5.

[82] L. Wittgenstein, *Philosophical Investigations*, 4th ed., G. Anscombe, P. Hacker and J. Schulte (trans.), J. Schulte (ed.) (London 2009), at paragraph 67; see also paragraphs 65–72, 75–80, 83–88.

[83] Ibid., at paragraphs 68, 69, 70–71, 76–77.

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C. Contractual Obligation

Finally, the puzzle about contractual obligation does not arise (or at least, does not arise in the same way) if we accept that a contract is just a certain sort of normative relationship, an exchange.

As we have seen, if we adopt the standpoint of the autonomous individual, it is puzzling why the law should impose contractual obligations. An autonomous individual's choices (even about fairly weighty matters such as long-term projects and plans) can change. Furthermore, any duty she owes to stay the course is not owed relationally to another particular person.

An exchange theory of contract gives up on the idea that contract law is at root about individual autonomy and replaces this with the idea that contract law is based on a normative relationship, the exchange. Abandoning the standpoint of the autonomous individual should remove any impetus to puzzle over why an individual's free will should be limited by a contractual obligation or over what can justify holding an individual to an earlier expression of intention when her preferences later change. Furthermore, abandoning the individualistic standpoint and focusing instead on a normative relationship should remove any impetus to puzzle over how the individual's will could be constrained in a relational manner – that is, in the form of an obligation owed to another particular person, the other party to the contract.

On an exchange theory, we can still pose questions about the binding force and relationality of contractual obligations, but these questions will appear in a quite different guise. For any given type of exchange, we might ask a question along the following lines: why, in (say) a sale of goods, does the buyer of the goods owe it to the seller to pay the purchase money (assuming the seller has delivered or will deliver)? But here an obvious answer presents itself. That is just what a sale of goods is. ("A contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price.") More generally, we might ask: why does an exchange require that each party perform for the other party their side of the exchange (assuming the other is willing and able to perform theirs)? Again, an obvious answer presents itself. It is a constitutive rule, inherent to the idea of exchange properly understood, that each party must perform their side of the exchange for the other.

Note that this may be understood as a practice-based or conventional account of contractual obligation. It is a constitutive rule of the practice of exchange that each party owes performance to the other. However, this account does not face the difficulties that we have seen are faced by autonomy theorists who seek to draw on the notion of a social practice

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in order to explain contractual obligation.[84] Unlike those theorists, we need not ask what reason an autonomous individual has to comply with the rules of a certain practice (rules which may not themselves be specified in relational terms). We can instead just accept that the practice of exchange establishes the norms of a certain kind of relationship.

On an exchange theory, there is no philosophical mystery about contractual obligation. Of course, many interesting sociological and ethical issues remain.[85] In particular, some will want to know what could explain or justify the law's valorisation of exchange. It is to that the article now turns.

D. Exchange as a Normative Idea

Why should the common law of contract have decided to focus on exchange and can this approach be justified?

The decision to orient the law of contract around exchange should not be wholly surprising given the character of the society that made it: a burgeoning mercantile civilisation. (Or more pejoratively: a nation of shopkeepers.) In this society – as in the societies that apply and develop the common law of contract today – exchange was widespread and hugely important. Indeed, this society may have been unlike many other societies in the extent to which it esteemed private ordering through exchange.[86] This kind of society might plausibly regard exchanges as especially deserving of contractual enforceability. As a rough approximation, we could do worse than say: the common law of contract's consideration doctrine instantiates a broader exchange ethos.

Some related social and institutional context is also worth noting here. Upholding exchanges is an activity that a King's court and its sundry officials might engage in without undue administrative difficulty or too much distortion of commercial practices. The court must merely adjudicate a dispute between the parties to the exchange about what they owe each other and require each to perform their side. In a sale of goods case, for example, the court can decide what goods, if any, must be provided and how much money must be paid, and if necessary order the seller to provide the goods or the buyer to pay the money. Contrast other informal transactions and relationships that do not typically take the form of quid pro quo exchanges – especially gift promises and other altruistic, familial, religious, romantic and social commitments. In a mercantile society these might be thought to present a less pressing case for legal

[84] Ibid., at part II(C).

[85] This article has put aside the important issue of the "strictness" of contractual obligation; see note 50 above.

[86] K. Polanyi, *The Great Transformation* (New York 1944). Polanyi's historical periodisation of the development of English society has been questioned, see A. Macfarlane, *The Origins of English Individualism: The Family, Property and Social Transition* (Oxford 1978), 199.

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enforcement. (After all, "[i]t is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner".)[87] Certainly it might be thought that many gratuitous, altruistic or social commitments are not worth the candle given the costs of intervention by the civic authorities – that the King's judges should not trouble themselves with dinner invitations and other such trivialities.

Indeed, enforcing non-exchange transactions might be thought to have other unappealing effects. The commitments in question might be highly context sensitive as well as personal or private, requiring nuanced and prying judgments about what exactly is appropriate in the context of, say, a particular family or romantic relationship.[88] Such commitments might be thought poorly suited to the cold, public and potentially severe processes of a civil court. Moreover, if contract law did police such commitments it could change the character of the relevant relationships and even the broader forms of life within which they take place – religious, familial or other altruistic contexts. People can act differently when legal officials are looking over their shoulders.[89]

For some – including the present author – it is enough, in order to render an exchange theory of contract plausible, just to remind ourselves that a certain type of mercantile society might regard exchange as especially worthy of valorisation.[90] However, other theorists may worry that this does not yet amount to a full-blown moral or normative justification for the exchange ideal.[91] Let us therefore note some well-known lines of argument that ought to appear, to someone who seeks that sort of justification, to have the potential to provide further reasons for exchange's normative significance in contract law. The arguments are canvassed here in the spirit of identifying directions for further scholarly inquiry, since it is well beyond the scope of this article to adjudicate among them (and indeed they are not necessarily exclusive).

One broad line of argument is economic. Many economically oriented scholars believe that enforceable exchanges tend to yield mutually beneficial outcomes for the parties themselves or that a generalised

[87] A. Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 1 (London 1776), bk. I, ch. 2, 17.

[88] *Balfour v Balfour* [1919] 2 K.B. 571 (C.A.); see more on "intention to create legal relations" below.

[89] Lewinsohn claims that the exchange criterion does not have "intrinsic significance" but rather a "functional" rationale, "screening off informal social and domestic agreements" from enforceability; see Lewinsohn, "Paid on Both Sides", 770. (Relatedly, he is inclined to regard the exchange criterion as a "proxy rule", which imperfectly tracks the distinction between commercial activity and social, domestic or other intimate activities – though he notes the criterion might turn out to "carve [. . .] up the social world directly at the joints" if "the exchange form . . . [is] partly constitutive of a nonintimate context"; see Lewinsohn, "Paid on Both Sides", 757, 759.) He does not explore the possibility that exchange might be esteemed in itself.

[90] Compare Stephen Smith's "moderate version" of the "morality criterion" for assessing theories of contract in S. Smith, *Contract Theory* (Oxford 2004), 18–23.

[91] Compare the "strong version" of Smith's "morality criterion" in ibid., at 13–24.

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system of free exchange produces valuable overall economic results.[92] At the same time, legal economists have suggested that non-exchange transactions such as gratuitous promises tend to be relatively economically insignificant and associated with high enforcement costs.[93]

Another broad line of argument is moral. Here one might emphasise the reciprocal or other-regarding character of exchange transactions. Mindy Chen-Wishart suggests that human beings have a deep and perhaps instinctive need for the particular form of reciprocity or quid pro quo that exchange embodies.[94] Whether or not that is true, as Chen-Wishart also notes, an exchange relationship certainly requires even transacting parties who are basically self-interested to achieve their ends by exhibiting a certain regard for their counterparties.[95] To achieve an exchange, each party must consider not only his own desires but also the other's – who must be induced to enter the exchange by the provision of something he views as beneficial.[96] To this extent each party must treat the other not merely as a means to his own ends but also as capable of setting and pursuing ends for herself.[97]

Alternatively, or in addition, a moral account of exchange may emphasise the egalitarian aspect of this relationship.[98] As Adam Smith famously observed, since in an exchange each party gets what they want by appealing to the other's self-interest, neither party need behave like a spaniel at a dinner table "begging for a favour", nor need either submit to the other's superior status.[99] Exchange is one "model of social relations between free and equal persons".[100]

Yet another other potential line of argument should be mentioned in order to put it aside. Exchange may be connected with arguably desirable forms of individual autonomy or self-assertion. Exchange might be thought to be grounded in individual sovereignty, not least because it seems to fit well with a system of individual personal and property rights in which each person is entitled to choose what to do with her own person and the things belonging to her.[101] Or one might suppose that the pursuit of

[92] See A. Gibbard, "What's Morally Special about Free Exchange?" (1985) 2 Social Philosophy & Policy 20.

[93] R.A. Posner, "Gratuitous Promises in Economics and Law" (1977) 6 Journal of Legal Studies 411, 417; M.A. Eisenberg, "Donative Promises" (1979) 47 University of Chicago Law Review 1, 4–5; compare Fuller, "Consideration and Form", 815.

[94] Chen-Wishart, "In Defence of Consideration", 218–20.

[95] Ibid.

[96] E. Anderson, *Private Government: How Employers Rule our Lives (And Why We Don't Talk About It)* (Princeton 2017), 5, discussing Adam Smith's views.

[97] Chen-Wishart, "In Defence of Consideration", 218.

[98] Here one need not adopt the controversial assumption that the things exchanged will be of roughly equal value. See e.g. J. Gordley, "Equality in Exchange" (1981) 69 California Law Review 1587; P. Benson, *Justice in Transactions* (Cambridge, MA 2019), ch. 4.

[99] Smith, *Wealth of Nations*, vol. I, bk. I, ch. 2, 17.

[100] Anderson, *Private Government*, 4. Anderson and other philosophers have explored the conditions under which exchanges may be truly egalitarian. E.g. A.J. Julius, "The Possibility of Exchange" (2013) 12 Politics, Philosophy, and Economics 361; T. Christiano, "The Tension between the Nature and the Norm of Voluntary Exchange" (2016) 54 Southern Journal of Philosophy 109.

[101] See Gibbard, "What's Morally Special".

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individual self-interest that typically occurs in an exchange is morally desirable (within limits). The difficulty with this sort of argument, for present purposes, is that it re-raises the puzzle of why the individual should be bound to perform her side of an exchange if she changes her mind or her self-interest shifts.[102] To the extent that the article's earlier argument has been successful, we should resist the suggestion that the normativity of exchange is underwritten by the value of individual autonomy.[103] On the contrary, exchange is the more basic idea here, which an autonomy theory of contract presupposes rather than explains.[104]

V. Liberalism, Exchange and Contract

As we have seen, one prominent strand in the "liberal" tradition emphasises the value of individual autonomy and seeks to explain contract law on that basis. From this perspective, the view that a contract law upholds a normative relationship – the exchange – may seem to impugn contract's liberal credentials. It will now be suggested that we should look to another strand in the liberal tradition – what is sometimes called "commercial" or "economic" liberalism – in order to appreciate the sense in which contract is a liberal institution.

It has been argued that the commercial or economic strand of the liberal tradition is coeval with the origins of the term "liberal" in something like our current sense, which may first have appeared in eighteenth century writing on commerce.[105] In 1766, in a bibliographical note on that "powerful commercial confederacy", the Hanseatic league, the Scottish historian William Robertson mentions

> the spirit and zeal with which [the League] contended for those liberties and rights, without which it is impossible to carry on commerce to advantage. The vigorous efforts of a society attentive only to commercial objects, could not fail of diffusing over Europe new and more liberal ideas concerning justice and order wherever they settled.[106]

Not long afterwards "liberal" was used in a similar way by Robertson's friend, Adam Smith.[107]

The connection between liberalism and commerce was entrenched by the time the *weltanschauung* known as "classical liberalism" gained

[102] On rule-based or practice forms of the individual autonomy view, see note 52 above. Transfer theories of contract provide another response to this challenge, e.g. Benson, *Justice in Transactions*.
[103] See part III(C).
[104] Which is not to deny that an institution of binding exchange may facilitate *some* exercises of individual autonomy. Part VI cautions against too rosy assumptions about the extent to which this occurs.
[105] D. Klein, "The Origin of 'Liberalism'", *The Atlantic*, available at https://www.theatlantic.com/politics/archive/2014/02/the-origin-of-liberalism/283780/ (last accessed 17 June 2025).
[106] W. Robertson, "A View of the Progress of Society in Europe" (1766), excerpted in H. Clarke (ed.), *Commerce, Culture, and Liberty: Readings on Capitalism Before Adam Smith* (Indianapolis, IN 2003).
[107] Including in Smith, *Wealth of Nations*. Smith was followed in this respect by a number of acolytes including influential writers for the *Edinburgh Review*, on which see Klein, "Origin of 'Liberalism'".

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extraordinary influence in nineteenth century England and elsewhere. Consider again the work of Herbert Spencer. Among the many other themes in his intimidating oeuvre, we can find a certain view of the connection between liberalism, contract and economic exchange. This theme is submerged in his *Ethics*, founded upon Spencer's avowed commitment to individual autonomy, but comes out clearly in his *Sociology*. Here Spencer contends that the highest stage of human society, and the only one in which liberalism can flourish,[108] is an "industrial" civilisation in which the distribution of goods and services occurs through self-regulating voluntary cooperation achieved through private exchange.[109]

In the same era classical economists such as Ricardo argued that voluntary exchange, especially in the labour market, must not be impeded: "*laissez faire*!"[110] By the mid-nineteenth century, a leading member of the famed "Political Economy Club" (which included Ricardo, Malthus, James Mill and others) could speak of "those liberal commercial principles now so generally diffused".[111] This strand of the liberal tradition remained vital at the beginning of the twentieth century, for example in economic and cultural history arguing that Britain's commercial freedom was the key to understanding its liberal mindset.[112]

Commercial liberalism has fallen out of favour today at least in certain academic circles. That is understandable. Reacting against the excesses of laissez-faire, liberal philosophers and social theorists have emphasised that unfettered free exchange unacceptably disadvantages some individuals,[113] and that marketisation or commodification crowds out other important values.[114] Still, debates among liberal scholars about how to limit and combat the negative consequences of our economic system arguably betray a deeper underlying consensus: that a liberal society will be, in no small part, a commercial society. As one commentator puts it:

> At bottom ... liberals of whatever persuasion have believed [in] a commercial society .... In comparison with their agreement about this fundamental truth, their disagreements about how the defects or abuses of a commercial society might be remedied are minor matters.[115]

[108] Spencer, *Man Versus the State*, 1–3.
[109] Spencer, *Principles of Sociology*, vol. II, ch. XVIII. This is a variant of an intellectual scheme favoured by various enlightenment writers that some claim is "the origin of sociological argument"; see L. Siedentop, "Two Liberal Traditions" in R. Geenans and H. Rosenblatt (eds.), *French Liberalism from Montesquieu to the Present Day* (Cambridge 2012), 21.
[110] See Keynes, "End of Laissez-Faire".
[111] J. McCullough (ed.), *Early English Tracts on Commerce* (London 1856), iii, quoted in Clarke, *Commerce*, xiii.
[112] H. Levy, *Economic Liberalism* (Macmillan 1913).
[113] J. Rawls, *A Theory of Justice: An Introduction* (Cambridge, MA 1971).
[114] E. Anderson, "Is Women's Labour a Commodity?" (1990) 19 Philosophy and Public Affairs 71.
[115] J. Jennings, "Liberalism and the Morality of Commercial Society" in S. Wall (ed.), *The Cambridge Companion to Liberalism* (Cambridge 2015), 57.

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That is certainly true of the liberal theorists who develop accounts of contract law.

The major recent exception to contract theorists' tendency to focus on individual autonomy rather than exchange is Nathan Oman's magnificent *Dignity of Commerce: Markets and the Moral Foundations of Contract Law*. Oman observes that

> theorists of contract law have tended to focus on promissory morality and individual autonomy in spinning their justifications for contract. … It is as though the role of contract law in supporting commerce is an accidental by-product of the law rather than its central goal. In practice, contract law overwhelmingly deals with matters of commercial exchange. This is not some accident of the way in which our society happens to use promissory morality. Rather, the support of commerce lies at the normative heart of contract law.[116]

As well as emphasising the link between contract and commerce, Oman associates contract with liberalism, exploring how contract law might be associated with certain "liberal virtues": "the traits that allow one to function successfully in a liberal society."[117]

Despite these affinities, the view of contract this article proposes is much more simple-minded than Oman's. His thesis is doubly instrumental and invokes sophisticated conceptions upon which the argument here does not rely. First, Oman argues that the purpose of contract law is to "strengthen and extend *markets*".[118] A "market" exists where repeated exchanges occur through open and voluntary collective social practices.[119] Oman notes that contract law gives parties the freedom to tailor their own transactions and render them secure through judicial enforcement and he claims that this freedom and sanctity of contract conduces towards establishing and maintaining markets[120] (although contract law is of course not always necessary for markets, as illegal "black markets" show).

Second, Oman claims that participation in markets promotes various "moral goods".[121] One such good is wealth, which can enhance human well-being in all sorts of ways. But markets also inculcate "liberal virtues" such as peaceableness, consideration for others, and the ability to cooperate despite ideological and cultural differences.[122] Here Oman joins the so-called "*doux-commerce*" strand of the liberal tradition.[123]

[116] N. Oman, *The Dignity of Commerce: Markets and the Moral Foundations of Contract Law* (Chicago 2016), 183.
[117] Ibid., at 43.
[118] Ibid., at 15 (emphasis added).
[119] Ibid., at 23–24.
[120] Ibid., at 36.
[121] Ibid., at 15.
[122] Ibid., at ch. 3.
[123] Notable exponents include Montesquieu and Albert Hirschmann, and this line of thought also appears in Spencer.

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The view this article has proposed makes no claims about the link between contract law and markets or between markets and liberal virtues. This is a significant advantage of the view because both links are doubtful. As for the claim that markets promote virtue, some reflection on European colonial adventuring should at least shake our confidence:

> Nothing is more characteristic than their system of stealing men in Celebes, in order to get slaves for Java … The young people thus stolen were hidden in secret dungeons on Celebes, until they were ready for sending to the slave ships. An official report says: "This one town of Macassar, for example, is full of secret prisons, one more horrible than the other, crammed with unfortunates, victims of greed and tyranny fettered in chains, forcibly torn from their families." … Wherever they set foot, devastation and depopulation followed. Banjuwangi, a province of Java, numbered over 80,000 inhabitants in 1750 and only 18,000 in 1811. That is peaceful commerce![124]

The alleged link between contract law and markets is also doubtful. The common law of contract appears to be interested in exchange rather than markets (repeated exchanges occurring through open collective social practices). The doctrine of consideration tests for exchange and not participation in a market. Thus, as Oman notes, at common law a non-exchange promise – such as the conferral of a gratuitous option – is usually *not* contractually enforceable even if made in a market context.[125] At the same time, an exchange *is* contractually enforceable even without any connection to a market. "Deals between private individuals … in no recognised or customary market and family settlements of many sorts are everywhere recognised as binding."[126] Hence Oman must confront American cases such as *Hamer v Sidway*, where the court enforced an uncle's promise to pay $5,000 if his nephew refrained from drinking, smoking and gambling.[127] Oman acknowledges that there was no market in such promises at the time of the contract. His theory drives him to claim that contractual enforcement was warranted because it could assist in generating a *new* market. (And "[w]ere such a market to develop, it could have all of the beneficial effects of other well-functioning markets", in terms of producing various moral goods.)[128] It would be simpler to accept that there can be contractual exchanges without markets.[129]

[124] K. Marx, *Capital: A Critique of Political Economy*, vol. 1, S. Moore and E. Aveling (trans.) (London 1957), 916; see also D. Lusordo, *Liberalism: A Counter-History*, G. Elliott (trans.) (London 2011), 20–21.
[125] Oman, *Dignity of Commerce*, 102.
[126] Fried, *Contract as Promise*, 36–37.
[127] *Hamer v Sidway* 27 N.E. 256 (N.Y. 1891).
[128] Oman, *Dignity of Commerce*, 103.
[129] Outside of contract law liberal states pursue other activities that facilitate markets, e.g. dredging shipping channels, laying communication cables, and punishing debasers of the currency.

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This article has proposed that the common law of contract upholds exchange because exchange is regarded as important and valuable in the liberal societies that have developed this body of law. A liberal theory of contract need not rely on alleged instrumental links from contract to market and market to virtue.

VI. Conclusion

In the course of becoming a global commercial empire, England bestowed or foisted upon large areas of the world both its common law of contract and an ambiguous ideological tradition going under the name of liberalism. The present article has sought to bring out some aspects of the ambiguity for those who would pursue, or oppose, a "liberal" theory of contract.

More specifically, it has been argued that autonomy theories of contract pursue a false lead in the liberal tradition. This area of law is not at root about individual choice or options. Contract law upholds a variety of customary types of exchange; notices individual choice only when it is a choice to exchange; and refuses to let individuals exit their exchanges. Contract law valorises exchange and this is often at the expense of autonomy.

Autonomy theories are attractive in part because contracting seems to expand the range of individual choice. After all, by contracting you can do all sorts of things you could not easily do otherwise – buy a car, get a job, run a business. Now, once a facility of enforceable exchange is up and running it is possible to view it from the perspective of an autonomous individual seeking to achieve her ends.[130] From this perspective, contract law may indeed appear to be a useful legal device or tool that opens up a range of options. However, this perspective presupposes the institution of enforceable exchange and cannot explain it.

By way of conclusion, it is worth briefly casting some doubt on the assumption that the facility of contracting does in fact enhance individual autonomy. This view seems to cry out for a sort of ideology critique. When contract theorists adopt the imagined perspective of an autonomous individual, they may systematically overestimate the autonomy benefits derived from exchanges and understate the trade-offs.[131] To be sure, by contracting you can acquire, say, a car, which may make travelling easier and freer for you (though you may find yourself trapped in traffic running errands). However, to get the car in a contractual exchange, you will have to *pay* for it. That will likely mean giving up a large amount of your time and effort, as crystallised in your income, which you must earn and hand over to

[130] G. Klass, "Three Pictures of Contract: Duty, Power, and Compound Rule" (2008) 83 New York University Law Review, 1726.

[131] Contemporary autonomy theorists claim that the "the autonomy-enhancing potential" of binding obligations generally "outweighs the autonomy-curtailing risk they create"; see Kimel, "Personal Autonomy", 99; see also Dagan and Heller, "Choice Theory", 7, 18–20.

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the seller of the car as quid pro quo. Likewise, contracting may help you get a job or run a business, with any luck gaining you a decent amount of money and some satisfying work (though those results are far from guaranteed). But again, to get these benefits you will have to pay. Here you may well have to give up, in the exchange, most of your life – most of your waking hours and energy. Is this autonomy? Or just participation in a complex industrial system oriented around conventional types of exchange?

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