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PRECONTRACTUAL JUSTICE

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ABSTRACT

This article develops a theory of just contractual relationships for a liberal society. As a liberal theory, our account is premised on liberalism's canonical commitments to self-determination and substantive equality. As a theory of contract law, it focuses on the parties' interpersonal interactions rather than on the justice (or welfare) of the social order as a whole.

Normatively, the article claims that the rules governing cases where one party experiences harsh circumstances or vulnerability during the bargaining process or operates under significant informational disadvantage must be guided by the commitment to relational justice, that is, to reciprocal respect for self-determination and substantive equality. Jurisprudentially, the article studies the systemic difficulties hindering the translation of these normative prescriptions into legal language and analyzes how they affect the form assumed by the law of precontractual justice and its institutional pedigree.

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INTRODUCTION

The relationship between contract and justice is longstanding and complicated. Contract features prominently in theories of justice (as in the varieties of the social contract) and justness in contract (or the lack of it) plays a major role in debates about the legitimacy of our socioeconomic order. In contract law and theory, however, justice seems marginal. Justice considerations are occasionally invoked by judges as well as legislators and justice-based accounts of contract do exist, but the former are typically vague and the latter, as we argue below, are frequently unpersuasive.

In this article, we spell out a theory of just contractual relationships for a liberal society. As a liberal theory, our account is premised on the liberal canonical commitments to autonomy (self-determination, not merely independence) and substantive (and not merely formal) equality. As a theory of contract law, our account focuses on the parties' interpersonal interactions and not on the justice of the social order as a whole. It thus refers to the parties' relationships as individuals rather than as co-citizens or subjects of the state.

The backdrop of our account is modern law's split from the (real or imagined) vision of laissez-faire,[1] evident in the development of the various (American law) doctrines governing the precontractual stage that we consider in this article.[2] Contemporary doctrines that regulate the parties' bargaining process go beyond the traditional model, which was limited to the proscription of one party's active interference with the other's free will. The law of fraud is no longer restricted to the traditional categories of misrepresentation and concealment and includes affirmative duties of disclosure. Similar expansions are evident in related doctrines—unilateral mistake, duress, and unconscionability—as well as in their regulatory cognates, such as anti-price-gouging laws.

We take these developments to be intuitively just, and our purpose here is to develop the strongest justification for them, including both substantive and jurisprudential aspects. Substantively, we claim that the rules governing cases where one party is vulnerable, experiences harsh circumstances during the bargaining process, or operates under a significant informational

1. The question of whether the traditional common law of contracts followed this ideal is highly controversial. Patrick Atiyah, for example, insists that contract law had "little more than a brief flirtation with" this position in the early nineteenth century and, from the start, had to contend with "serious opposition" from some judges, who ultimately won out. P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979), at 479.

2. Doctrines governing contracting parties' rights and obligations as well as consequences of nonperformance are also guided by relational justice. Since these doctrines raise further distinctive complications of contract-related vulnerability to opportunism, we discuss them in a separate companion piece. *See* Hanoch Dagan & Avihay Dorfman, *Justice in Contract*, 67 AM. J. JURISP. (forthcoming 2022). In some contexts, these complications surface in the precontractual stage, thus blurring to some extent the line between precontractual and contractual justice.

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disadvantage are best justified by reference to a commitment to relational justice, that is, to reciprocal respect for self-determination and substantive equality. Jurisprudentially, we hold that grappling with the two main systemic obstacles to the translation of this normative prescription into the language of law—line-drawing and sensitivity to final incidents—requires their articulation in the relatively clear rules often devised by legislatures and regulators rather than courts.

Section I broadly describes the doctrinal development we will be investigating, briefly addressing two possible strategies for bracketing (if not dismissing) our justificatory challenge. Two accounts of contractual justice that take this challenge seriously but ultimately fail are then discussed in greater detail. We argue that the idea of just exchange, its honorable legacy of "just price" analysis notwithstanding, either begs the question or overly fixates on enshrining the status quo. Similarly, we claim that efforts to ameliorate distributive injustices are certainly laudable but severe difficulties hamper the pursuit of this public goal through contract since the expected distributive impact of many canonical examples of justice-oriented contractual rules is neutral, if not regressive.

These difficulties imply that, despite the intuitive sense about the justness of these rules, their basis is neither just exchange nor distributive justice. The way is clear, then, for our theory of just contractual relationships. Section II refines both the substantive and jurisprudential contributions of this article. Substantively, the justificatory challenge posed by contract law's justice-oriented rules helps to clarify the contours of relational justice. Like corrective justice, relational justice is a principle of interpersonal relations. Yet, because it upholds reciprocal respect for self-determination and substantive equality (rather than for independence and formal equality) it can account for modern contract law. Taking self-determination and substantive equality seriously aligns relational justice with the normative commitments of relational egalitarianism. The contractual context, however, highlights the differences between them, both regarding the range of inappropriate treatment they proscribe and the capacity of the parties (persons or citizens) they focus on. Finally, the contractual setting helps to demonstrate why relational justice must take into account economic insights as per the incentive effects of legal rules while resisting welfare-foundationalist views of contract.

As for the jurisprudential aspect, we consider the possibility that laissez-faire may have been justified by reference to the institutional limitations of the judiciary, once the sole architect of contract law.[3] In the bargaining context, relational justice entails affirmative interpersonal obligations. Prescribing these obligations while respecting the rule of law

3. The term laissez-faire is misleading since, like any other economic system, it necessarily relies on a robust legal infrastructure. *See* Hanoch Dagan et al., *The Law of the Market*, 83 Law & Contemp. Probs. i (2020).

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often requires complicated and, at times, contextualized and not fully principled line-drawing exercises. Careful attention to the possible responses of legally informed potential promisees that might undermine the normative underpinnings of the law is also required. All these features affect the desirable form of precontractual law and its institutional pedigree. Therefore, while common law judges may set vague standards in response to the demands of relational justice, legislators and regulators are often better suited to translate these demands into their proper, more rule-like form.

Section III turns from theory to doctrine, offering a rational reconstruction of modern precontractual law, which sets the floor for contractual justice. We do not presume to unearth what the (many) judges and other lawmakers who developed the doctrines of nondisclosure, duress, and unconscionability as well as their regulatory cognates intended. Instead, we show that relational justice offers the most persuasive justification for the interpersonal obligations prescribed by these doctrines, which apply when one party in the bargaining process operates under a significant informational disadvantage, is vulnerable, or is affected by harsh circumstances.[4] We thereby seek to provide a new perspective on precontractual law, calling for a charitable interpretation of it that may facilitate further desirable developments.

I. AN ELUSIVE QUEST

A. A Real Challenge?

The purpose of this article is to identify the strongest justification for current precontractual doctrines that, as Melvin Eisenberg noted, impose "a duty to rescue," that is, "a duty that is imposed by law upon one actor, *A*, to bestir himself to take a low-cost, low-risk, and otherwise reasonable action that will forestall a major loss to another actor, *B*, although *B*'s peril of prospective loss is not created by *A*'s fault."[5] These duties imply that modern law can no longer be accounted for by the corrective justice ideal of interpersonal independence and formal equality. Corrective justice requires contracting parties to refrain from interfering, injuring, or adversely affecting each other's rightful possessions but also implies that they are entitled to be indifferent to each other's needs, wishes, or purposes. It may be honorable, for example, to refrain from taking advantage of the other party's ignorance. Yet, given that, on this view, no one is obliged to further the

4. One complication not fully addressed in this article concerns the contexts of corporate or governmental involvement in contracts. Our account captures corporations inasmuch as they are duty-bound to natural persons (e.g., as sellers or employers). But cases involving corporations on both sides of the interaction as well as cases involving duties of natural persons to corporations are beyond the scope of the present account. *Any* ultimate conclusion on these matters must presuppose a theory of corporation, and this article does not develop one.

5. Melvin A. Eisenberg, *The Duty to Rescue in Contract Law*, 71 FORDHAM L. REV. 647, 647, 654 (2002).

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purposes or needs of others, a party's information imperfections are, as such, legally inconsequential. The sheer failure of one party to disclose information and dispel a mistake of the other, for which the former is not responsible, is compatible with the parties' rights to interpersonal independence.[6]

Libertarian proponents of this approach are likely to find our endeavor of seeking justifications for existing law misguided since they view its development as a story of decline. Thus, Richard Epstein claims that contract law should perceive its subjects as abstract beings, whose particular features and possible harsh predicament have no bearing on the legal analysis. Legal analysis, on this view, should focus exclusively on the protection of interpersonal boundaries. As long as the pressure a promisee uses to extract a promise is not a crime, a tort, or a violation of a specific legislative enactment, argues Epstein, the promisor's distress need not affect the validity of her promise. Likewise, a promise should be fraud-proof if the promisor does not misrepresent the pertinent facts or actively conceal them from the promisee. The sheer fact of nondisclosure is, in the libertarian account, irrelevant.[7]

Libertarian opposition to liberal doctrines is certainly unsurprising. Listing here the familiar reasons for rejecting the libertarian viewpoint would be distracting, which is why we started by pointing out the intuitive appeal of current precontractual law. Corrective justice need not subscribe to a libertarian theory of law, however. Indeed, some corrective justice views of private law reject libertarianism as a political philosophy and rely instead on a strict division of institutional and moral labor, which assigns responsibility to the state, and only to the state, for facilitating individual self-determination and ensuring substantive equality.[8] Corrective justice theorists who admit the intuitive justness of contemporary law may thus seek to explain its rules relying on the commitment to interpersonal independence and formal equality, or reclassify them as part of public law and thus external to contract law.[9] Either way, they would insist, our quest for a refined contractual justice that diverges from corrective justice is misplaced.

Our detailed analysis of the pertinent doctrines in Section III shows that viewing them as manifestations of reciprocal respect for interpersonal independence is implausible. Moreover, reclassifying all of them as public law implies an extensive deletion and renaming exercise that artificially limits the domain of contract law and dilutes its normative appeal. These results

6. *See* Peter Benson, *The Idea of a Public Basis of Justification for Contract*, 33 Osgoode Hall L.J. 273, 315 (1995).

7. *See, e.g.*, Richard A. Epstein, *Unconscionability: A Critical Appraisal*, 18 J.L. & Econ. 293, 293–301 (1975).

8. *See, e.g.*, Arthur Ripstein, Private Wrongs (2016), at 37; Ernest J. Weinrib, Corrective Justice (2012), at 263–296.

9. *See* Arthur Ripstein, *The Contracting Theory of Choices*, 40 Law & Phil. 185 (2021).

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were to be expected, however, because taking seriously the commitment to self-determination and substantive equality makes the exclusion of these values from private law indefensible. Upholding these values in our horizontal (interpersonal) interactions is as crucial as doing so in our vertical (state-individual) ones, although their effects are different. The division-of-labor view of law is not sufficiently attentive to two facts about the human condition: our interdependence and our personal differences. These two elements explain the profound significance of private law, which governs interpersonal relationships, for our ability to lead successful lives and relate to one another as equals.[10]

Our practical affairs are replete with interactions with others, from single trivial transactions up to the most crucial relationships involving family, friends, work, and positions we may occupy in society. In these interactions, we either invite others/are invited by them to join projects or we place their legitimate interests at risk. Our standing vis-à-vis others in these contexts of interdependence implies that self-determination and substantive equality are not extrinsic to the assessment of our interactions as just or unjust. The justice of an employment relationship or of a mundane consumer transaction, for example, cannot be plausibly assessed if analyzed in terms of an interaction between formally independent and equal persons.

Public law, therefore, cannot be made to bear exclusive responsibility for our self-determination and substantive equality, nor can private law be content with the requirement that people respect one another as independent and formally equal individuals. Often, ignoring self-determination and substantive equality may be tantamount to undermining these two basic liberal commitments. Public law, however generous, cannot ameliorate the injustice that adherence to interpersonal independence is bound to generate in employment, consumption, and many other contractual interactions.

B. Just Exchange

Before turning to our account of current law, we will address two available theoretical alternatives: just exchange and distributive justice. Consider first "the ancient idea," which has been revived and modernized by James Gordley: "in an exchange the value of what each party gives should be equal to the value of what he receives." Disparity in value, on this view, is an "evil in itself" since it violates Aristotelian commutative justice. Thus, "performances exchanged ought to be equal in value so that neither party is enriched at the other's expense."[11]

Gordley acknowledges that the crucial question for a theory of equality in exchange is how these equality judgments should be made. If the idea of

10. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1415–1417 (2016), which the two following paragraphs summarize.

11. James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1587–1588, 1590, 1655 (1981).

just exchange is to have independent normative force, the measure it uses must be different from the parties' subjective valuations. Gordley's charitable reconstruction of the just price legacy suggests that the proper measure for equality is "the market price set under competitive conditions by normal trading." Scholastics and natural lawyers admittedly lacked knowledge of modern economics and, consequently, held that the just price should be "determined by the *communis aestiomatio*" or estimate of the commons. They did concur with the modern economists' view, however, that the market is supposed to reflect "the needs of buyers, the scarcity of goods, and the costs of producing them."[12]

To explain why a market price can be expected to preserve equality and thus make sense of the notion of just price, Gordley claims we should focus on the parties' decision regarding price and appreciate its uniqueness. Unlike the parties' subjective preferences, which determine all other aspects of their transaction, the decision as to the proper price is one that "all potential buyers and sellers face whatever their aspirations and circumstances." A party who does not "use the market price" is thus assumed to be "either unaware of [it] or unable to use the market," which means that a contract price that deviates from the market price can only be explained by reference to "ignorance or necessity." Because neither party has a "moral or equitable claim to the benefits that exchange confers" on the other, this conclusion implies that parties should not be free to decide the price in a contract.[13]

This is a complex argument that can be read in two different ways.[14] One reading of the equality in exchange theory emphasizes the normative pitfall of benefiting from another's ignorance or necessity. The view arguing that a contracting party should at times accommodate the other's inferior position or unfortunate predicament is highly commendable. But unless we assume that changes from the status quo distribution are wrongful *as such*, the proposition that one party must not benefit from another's ignorance or necessity fails to explain why the benefiting party should be the one responsible for taking measures to protect the disadvantaged party. The actual justification of this responsibility is important for the proper setting of its boundaries since ruling out benefits from ignorance and necessity seems both over- and underinclusive. It is overinclusive because the willingness to pay more (or receive less) than the market price is hardly questionable if based on expensive tastes (or indifference to cost) or sheer neglect to acquire pertinent information that the other party invested time and effort in collecting. At the same time, it seems underinclusive because some harsh predicaments that are entirely unrelated to informational disadvantage

12. *Id.* at 1604–1605, 1607–1609.

13. *Id.* at 1612, 1616–1619, 1624.

14. One important difference between these readings is that only the second necessarily relies, as the text clarifies, on a theory of value. The first need not take a stand on this topic and our theory of relational justice similarly brackets it.

could also justify accommodation. Our account of contractual justice could be read as unpacking, indeed defending, the first reading of just price theory, thus properly delineating its doctrinal boundaries.

The second reading of just price theory, which seems more loyal to Gordley's, sets these questions aside by focusing on the possible redistributive effects of the contract price's deviation from the market price. Gordley notes that earlier jurists and philosophers who advanced the just price doctrine held that neither party should be able to claim that the other should share any "singular utility or benefit" derived from the exchange.[15] This dramatic prohibition of *all* forms of price discrimination dismisses the significance of people's particular judgments and the way they assess alternative options and opportunities.[16] But it is justified, Gordley claims, because neither party should be "enriched at the other's expense." Aristotelian commutative justice implies that "a party should be free to exchange" but "should not be free to redistribute wealth in his own favor."[17]

Grounding the justice of contract on the principle against unjust enrichment, however, begs the question, and relying on a strict prohibition of redistribution is normatively indefensible. The notion of unjust enrichment cannot, in and of itself, provide a secure foundation for the ground rules of contract. To decide whether a specific enrichment is just, a decision is first needed on whether the parties' starting points are just and on what makes a specific distributive change unjust.[18] The proposition that an exchange must be based on prevalent market prices merely begs—or worse, obscures—these questions. This move is particularly troublesome as a means for prescribing the justice of contract given that contract law is part of the legal infrastructure that sets up both the distributive status quo and the market prices that just price theory valorizes as the baseline.[19]

Shifting from the unjust enrichment language and its moralistic subtext to an anti-redistributive maxim hardly helps this reading of equality of exchange theory because this maxim lacks any normative weight. Even critics of the view that private law should promote distributive justice do not subscribe to Gordley's proposition that "the task of private law is to preserve the distribution of wealth."[20] The objection is even sharper regarding contract, a major tool people can legitimately use to enlist one another in the development of their projects and plans according to their judgments.

15. Gordley, *supra* note 11, at 1604, 1616.

16. Price discrimination may certainly be unjust, but, as the text implies, we see no reason for condemning sheer pricing differentiation if it does not involve relational injustice or entail distributive injustice.

17. Gordley, *supra* note 11, at 1604, 1616.

18. *See generally* HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION (2004), at 11–36.

19. *See respectively, e.g.*, David Singh Grewal, *The Laws of Capitalism*, 128 HARV. L. REV. 626, 658–660 (2014); Robert C. Hockett & Roy Kreitner, *Just Prices*, CORNELL J.L. & PUB. POL'Y 771, 782 (2018).

20. James Gordley, *The Just Price: The Aristotelian Tradition and John Rawls*, 11 EUR. REV. CONTRACT L. 197, 207 (2015).

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While it is easy to see how proscribing these reallocations of risks and opportunities would undermine contract's familiar functions, it is much harder to see how it would promote (or even preserve) justice.[21]

C. Distributive Justice

In Gordley's account, distributive justice has no place. By contrast, Aditi Bagchi argues it should be central to contract. Bagchi is aware of the comparative advantages of the tax-and-distribution system for effectuating a (relatively) egalitarian distribution of material resources, a goal that cannot be appropriately implemented via contract law. She insists, however, that distributive justice should nonetheless inform "rules dealing with validity, interpretation, and remedy." The content of these rules, she clarifies, need not—indeed, should not—be "'set' instrumentally with an eye to distribution," but *should* turn on "background distribution, as well as prospective effects on distribution."[22]

These factors are relevant to the interpersonal rules of contract law, Bagchi claims, because the conventional view whereby "the wrong of distributive injustice is collective and does not trickle down to each of its members" is misguided. Individuals are implicated in the state's duties concerning distributive justice, she argues, because the "imperfect rights in [other] individuals to such justice" give rise "to a perfect right against [these] other individuals not to have that distributive injustice exacerbated or exploited by their actions."[23] While exploiting an injustice is not equivalent to creating one, "bad conduct does not become benign just because it was preceded by still worse behavior." Thus, although contract law should not be used "to directly transfer money from rich (or some rich) to poor (or some poor) with the aim of achieving some marginal step toward distributive justice," its "boundaries on morally acceptable individual behavior" should be informed by society's failure "to meet the distributive obligations of political morality."[24]

According to Bagchi, "a duty not to take advantage of distributive injustice and make it worse probably does not exhaust the scope of individual

21. Gordley's anti-redistributive maxim may be charitably founded on the view that contracts are (or should be) means for inducing and rewarding productive activity and should be shaped to perform this, and only this, goal. We hold that subordinating the autonomy-enhancing potential of contract to the (collectivistic) logic of production is unjustified. Be that as it may, what is presented as an assessment of the justice of an exchange ends up as an assessment of its social usefulness.

22. Aditi Bagchi, *Distributive Justice and Contracts*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT 193, 193–194, 199 (Gregory Klass et al. eds., 2014). In this respect, Bagchi follows Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980). Kronman's familiar account, which focuses on the just distribution of the "forms of advantage-taking possible in exchange relations," relies on the controversial view that "the notion of individual liberty. . . offers no guidance in determining which of the many forms of advantage-taking possible in exchange relations render an agreement involuntary." *Id.* at 474.

23. Bagchi, *supra* note 22, at 197, 201–202.

24. Aditi Bagchi, *Distributive Injustice and Private Law*, 60 HASTINGS L.J. 105, 128, 135 (2008).

moral duty under conditions of distributive injustice" and "may not exhaust the scope of legally enforceable duty," but should be recognized as a minimum.[25] Thus, although the duties that infuse contract are "ultimately interpersonal moral duties," their content (meaning the prohibition against exacerbating or exploiting distributive injustice) "turns on the normative state of the world (i.e., distributive justice or injustice) and related facts about distribution."[26]

Bagchi sees nothing arbitrary in "recognizing those distribution-sensitive constraints in the liability conditions of contract law."[27] Quite the contrary, "distributive injustice is imbedded in the moral structure of our interpersonal relations, and plays a direct role in defining the scope of individual responsibility."[28] Indeed, by focusing on the duty to refrain from exploiting distributive injustice, this account helps to refine the specific obligations toward the poor and disadvantaged incumbent on those who seek to interact with them through a direct, profitable exchange.[29] It also clarifies that the requirements of contractual fairness need not be overridden by the victim's consent.[30] Finally, honing the relationship between contract and distributive justice along these lines is consistent with the observation that contract law is "less sympathetic to those whose weak bargaining power reflects bad luck rather than distributive injustice."[31]

Like Bagchi, we hold that a theory of contractual fairness can hardly be oblivious to the exploitation of a party's poverty or disadvantageous predicament but we are far less certain that the prohibition against such exploitation is best justified, as she argues, by reference to distributive justice. Our concern is twofold. On the one hand, this prohibition is often unlikely to vindicate distributive justice and, on the other, the prohibition against exploitation of a party's poverty seems only one aspect of a nondistributive conception of justice, which Bagchi's framework obscures.

Bagchi is aware of both these difficulties. She recognizes that "regulating terms risks increasing transaction costs for some parties," and concedes that these costs become "perverse" when "they are disproportionately borne by the socially disadvantaged." But this "futility" challenge, she argues, is highly contingent, as it depends on "how a variety of market actors value exchange on a variety of terms."[32] Bagchi also acknowledges that not all cases of illegitimate contractual exploitation are "marked by background distributive injustice," but insists that the fact that so many are is telling.[33] These responses, however, are unpersuasive.

25. *Id.* at 135.
26. Bagchi, *supra* note 22, at 197.
27. *Id.* at 195.
28. Bagchi, *supra* note 24, at 147.
29. *Id.* at 125.
30. *See* Bagchi, *supra* note 22, at 202–207.
31. Bagchi, *supra* note 24, at 136.
32. Bagchi, *supra* note 22, at 209–210.
33. *See* Bagchi, *supra* note 24, at 139.

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The futility challenge cannot be easily dismissed since it *systematically* haunts the most paradigmatic examples of justice-oriented contractual terms. Thus, Richard Craswell shows that "defining a 'pro-consumer' distributional position" regarding warranties is problematic since such rights affect different consumers in different ways. Moreover, because the rich are typically "willing to pay more for protection against [many risks] simply because they have more money with which to pay," the intraconsumer distributional effects of many proconsumer rights are likely to "favor the rich at the expense of the poor." This means that "the identity of the winners and losers may be correlated with wealth in a way that makes the resulting redistribution regressive."[34] This analysis applies quite broadly, which explains (for example) the conventional economic wisdom of distributive justice recommending the use of earned income tax credit rather than minimum wage,[35] and substituting rules like the implied warranty of habitability with direct measures (such as subsidies) to improve the income of poor tenants.[36]

Bagchi's response of contingency seems to underrate the gap between distributive justice and the interpersonal prohibition she wishes to defend. But even if, as she claims, the difficulty is less common than this economic wisdom seemingly suggests,[37] the commitment to distributive justice would require the architects of contract rules to follow the final incidents of each potential measure and define illegitimate exploitation accordingly. Thus, Bagchi's claim, that the *interpersonal* exploitation of another's poverty is unacceptable, is not necessarily related to distributive injustices.

We need not subscribe to the view that distributive justice should never trump the demands of private law justice to appreciate the significance of prohibiting *interpersonal* exploitation. While distributive justice can be addressed elsewhere (e.g., tax and redistribution), only private law—the law of our interpersonal interactions—can address instances of misconduct in terms of relational wrongs. Furthermore, pursuing a framework of distributive justice in private law eliminates this law's relational structure. A distributively just private law would have to shift its focus to the "relationship" between each separate party to the interaction *and society*. By contrast, both private law and the prohibition against interpersonal exploitation single out the interacting parties as a source of concern quite apart from

34. Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 Stan. L. Rev. 361, 376–377 (1991).

35. *See* Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. Chi. L. Rev. 405 (1997).

36. *See* David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 Cal. L. Rev. 389, 461 (2011).

37. A celebrated empirical study finds that a relatively modest increase in minimum wage need not reduce employment. *See* David Card & Alan B. Krueger, *Minimum Wage and Employment: A Case Study of the Fast Food Industry in New Jersey and Pennsylvania*, 84 Am. Econ. Rev. 772 (1994). *See also* Arindrajit Dube, *Minimum Wages and the Distribution of Family Incomes*, 11 Am. Econ. J. 268 (2019).

inequalities in the overall distribution of resources and opportunities in society.[38] Theories based on distributive justice cannot account for the irreducible interpersonal focus of contract's justice-oriented doctrines.[39]

The warranted inference is not that relational justice should never give way to considerations of distributive justice. Sufficiently pressing distributive concerns may legitimately override the demands of private law's relational commitments. But grounding these commitments in distributive justice precludes such (certainly complex) judgments altogether because it suggests a lexical priority of distributive justice that we find unacceptable. Similarly, our second qualm is that, although the wrongness of exploiting another's poverty is an important concern,[40] a relational justice framework sheds light on other and no less important forms of unacceptable exploitation and interpersonal wrongs.

II. THE JUSTICE OF CONTRACT LAW

Private law is not merely one more instrument for achieving public goals such as, for example, distributive justice or social welfare. Having a specific body of law to govern interpersonal relationships is normatively significant, although it need not imply a strict separation between private and public law. Recognizing the significance of private law highlights the freestanding import of the social, a realm that is irreducible to the statist.[41] As part of private law, contract law governs an array of social spheres including commerce, work, home, and family. It should thus be attuned to both the value and the potential threat of our interpersonal interactions within these spheres. A just contract law must set the floor for acceptable ways of people treating one another in and around contracts.

Our core substantive claim in Section II is that the strongest justification of justice-oriented doctrines in contract law is the maxim of reciprocal respect for self-determination and substantive equality. This maxim applies to all interpersonal interactions[42] but is particularly pertinent to contract

38. *See* Avihay Dorfman, *Private Law Exceptionalism? Part II: A Basic Difficulty with the Argument from Formal Equality*, 31 CAN. J.L. & JURIS. 5, 11–12 (2018).

39. At times, the interpersonal nature of these duties is demonstrated by the fact that they only apply to a specific category of contractors such as employees, tenants, or consumers, and that they are not—at least not fully—assignable. Partly, this is also the reason consumer protection laws protect consumers rather than persons who obtain the goods for resale or other commercial purposes. *See* RESTATEMENT OF CONSUMER CONTRACTS §1 Reporters' Note (AM. L. INST., Tentative Draft No. 1, 2019).

40. *See* Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice (Apr. 21, 2022), https://ssrn.com/abstract=3637034.

41. *See generally* Dagan & Dorfman, *supra* note 10, at 1406–1409.

42. *See* Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, U. TORONTO L.J. 207 (2021); Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 96 NOTRE DAME L. REV. 513 (2020); HANOCH DAGAN, A LIBERAL THEORY OF PROPERTY (2021), at 114–147; Avihay Dorfman, *The Relational Justice of Torts*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 321 (Hanoch Dagan & Benjamin Zipursky eds., 2020); Hanoch Dagan, *Autonomy, Relational Justice, and*

formation, which signals entry into a regime of elevated responsibility epitomized by the vindication of the parties' expectation rather than merely their reliance. Implementing this maxim at the precontractual stage while remaining properly attuned to parties' possible avoidance strategies, however, is a challenging task given rule-of-law concerns and the judiciary's institutional limitations. These challenges help to refine the jurisprudential prong of our thesis, dealing with the desired form of precontractual law and its institutional pedigree.

A. Relational Justice and Contract Formation

Interdependence and personal differences, as mentioned, underlie our objection to the corrective justice ideal of interpersonal independence. Given the centrality of personal interactions, we hold that a genuinely liberal polity must not relegate full responsibility for self-determination to public law. When private law renounces responsibility for facilitating personal interactions, it risks devaluing the significance of family, work, home, community, and commerce relationships in people's lives.

Given that private law (and contract law even more so) addresses interactions, the question of whether parties relate as equals becomes both a source of concern and in itself a source of value. Ideally, this pursuit of equality is meant to supplement, rather than supplant, the requirements of justice in holdings (and opportunities). Yet, although its success often depends on the performance of the background regime that attends to distributive justice, relational justice is not reducible to distributive justice. Quite the contrary. The significance of our interpersonal interactions to our self-determination implies that relational justice is valuable in and of itself, that is, even when it departs from the demands of distributive justice.[43]

A requirement of reciprocal respect for people's self-determination and substantive equality is particularly appropriate in the context of contract formation.[44] In a contractual relationship, the parties bear heightened responsibility. Strangers must take reasonable care lest they be responsible for harm inflicted on others. By contrast, the responsibility of contractual parties is typically strict (with only limited reasons for excuse)[45] and extends

Restitution, *in* Research Handbook on Unjust Enrichment and Restitution 219 (Elise Bant et al. eds., 2020).

43. *See* Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 Law & Phil. 171 (2018). In certain contexts, the regressive effects of relational justice can be addressed by regulatory reinforcement mechanisms such as a duty to deal, which meets the concern that sellers or service providers might avoid segments of the market.

44. The requirement of respect, and thus the morality of laws complying with relational justice, do not turn on the actual motivations of duty holders. A liberal law only compels people to act in conformity with this demand rather than because of it. *See* Avihay Dorfman, *Private Ownership and the Standing to Say So*, 64 U. Toronto L.J. 402, 413 nn.26 & 36 (2014).

45. *See, e.g.*, Stees v. Leonard, 20 Minn. 494 (1874). *Cf.* Nick Sage, *Contractual Liability and the Theory of Contract Law*, 30 King's L.J. 459 (2019).

the other party's expectation interest, that is, "having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed."[46] Contract formation, then, empowers people: the enforcement of wholly executory contracts makes contract a major interpersonal planning device and thus a key tool in the realization of their higher-order projects.[47] At the same time, it makes people particularly susceptible to the risk of others taking advantage of their ignorance, exploiting the harsh circumstances they may be placed in, or their vulnerability in general.

The demand of relational justice that potential promisees refrain from such abuse is also particularly called for. A return to first principles underlying the legitimacy challenge of contract will shed light on the reasons for this demand. Enforcing contracts is an obvious feature of our legal environment, but is far from trivial. Justifying the application of law's authority and power against promisors even before promisees have been harmed, and even if the promisees' expectations have not been met for reasons beyond the promisors' power, would be difficult if interpersonal obligations were exhausted by the maxim of reciprocal respect for independence, as corrective justice prescribes. Reneging on a wholly executory contract that has not yet been relied upon frustrates the expectations of promisees, undermining their ability to use contract as a planning, and thus autonomy-enhancing, device. In a regime of interpersonal independence, however, people are entitled to ignore others' needs and advantages and these setbacks cannot qualify as a legitimate reason for obligating the promisor.[48]

One way of explaining contract legitimacy, which we take as a given, is to discard the corrective justice view in favor of a less rigid principle of interpersonal relations. When going beyond the harm principle, contract law imposes a burden on prospective promisors that, though modest, is highly significant to their promisees' ability to use contract as a planning device. In a liberal polity, people can justifiably be expected to incur this reasonable burden to benefit others they interact with. Thus, the puzzle of contract legitimacy is solved when we recognize a duty of reciprocal respect for people's right of self-determination.

One of us has defended these propositions in greater detail elsewhere,[49] and we will only note here that their implications for the present account

46. RESTATEMENT (SECOND) OF CONTRACTS §344(a) (1981).

47. *See* Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 LAW & PHIL. 213 (2021).

48. *Cf.* Peter Benson, *Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory*, 10 CARDOZO L. REV. 1077, 1100, 1111–1116 (1989); Peter Benson, *Contract as Transfer of Ownership*, 48 WM. & MARY L. REV. 1673, 1682–1683 (2007). Benson argues that such a breach amounts to a wrongful *dispossession* of the promisee, but the transfer theory that this claim is premised on is indefensible. *See* HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (2017), at 33–40; Dagan & Heller, *supra* note 47; Hanoch Dagan, *Two Visions of Contract*, 119 MICH. L. REV. 1247 (2021).

49. *See* DAGAN & HELLER, *supra* note 48, at 38–39; Dagan & Heller, *supra* note 47; Hanoch Dagan & Michael Heller, *Why Autonomy Must Be Contract's Ultimate Value*, 20 JERUSALEM REV. LEGAL STUD. 148, 158–164 (2019).

are dramatic. They suggest that reciprocal respect for self-determination is *not* related to contract only externally. Moreover, without *some* attention to the distinctive features and predicament of the other, respect for self-determination is hollow and, therefore, substantive equality is also part of this justification of contract. Reciprocal respect for self-determination and substantive equality is thus the premise of contract legitimacy. This means that attempts to enlist contract in the service of arrangements that undermine relational justice must be treated (at least prima facie) as *ultra vires*. They abuse the idea of contract by invoking it in defiance of its own legitimacy.[50]

In this light, justice-based rules of contract law successfully rebut their worrisome image as conveying unwarranted paternalism.[51] The concern is that these rules unfairly stigmatize the weaker parties as unable to protect themselves and prevent them from using contract in potentially empowering ways.[52] Paternalistic doctrines and policies should indeed be resisted because they substitute people's judgment and circumvent their will in an effort "to supplant or maneuver around an agent's agency. . . motivated by distrust of that person's agency." They thus "convey a special, generally impermissible, insult to autonomous agents."[53] But prescribing a floor for the enforcement of voluntary undertakings as per the requirements of relational justice is not paternalistic. If enlisting law in the cause of contract enforcement must rely for its justification on an interpersonal obligation of respect for self-determination and substantive equality, then contract—or at least liberal contract—cannot legitimately contravene relational justice. Liberal contract's adherence to relational justice abides by the normative foundation of contract's legitimacy and has nothing to do with paternalism.[54]

Could this be a path to the destruction of the parties' independence? This unacceptable result would indeed ensue if relational justice implied that "everyone has a standing duty to see to it that the particular other

50. *See* Dagan & Heller, *supra* note 47; Dagan & Heller, *supra* note 49, at 152.

51. A related qualm is that an immutable floor entails a suspiciously normalizing effect. *See* Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy (1996), at 413, 416. For our response, *see* Hanoch Dagan, *The Value of Choice and the Justice of Contract*, 10 Jurisprudence 422, 432–433 (2019).

52. *See* Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 Va. L. Rev. 1053, 1081–1082 (1977).

53. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 Phil. & Pub. Affs. 205, 207, 213, 215, 220, 231 (2000).

54. Shiffrin's response to the paternalism challenge is that the state "has at least a permission and perhaps a deontological commitment not to assist grossly unfair treatment of one of its citizens by another." She thereby follows—and indeed embraces—a judicial practice of refusing to enforce such contracts because they are unworthy of law's support. *See* Shiffrin, *supra* note 53, at 227–230, 235. This response may be troublesome, however, insofar as it is based on moral sentiments external to contract. Sanctioning a broad judicial power to examine whether contracts deserve the state's support is problematic, as contract law's traditional denial of recovery by unmarried cohabitants based on its moral condemnation will attest. *See* E. Allan Farnsworth, Farnsworth on Contracts §5.4 (4th ed. 2004).

persons with whom they are interacting lead autonomous and successful lives."[55] But this is not what relational justice demands. Safeguarding people's independence is critical (certainly regarding contract), even if law's ultimate commitment is to self-determination. And yet, given the wide variety of grave restrictions to specific liberties and their importance for conducting a meaningful life, not all infringements of independence are impermissible.[56] The independence of parties should be strictly upheld when it is crucial for ensuring their self-determination and when there is no threat to their counterparts' self-determination. But a liberal contract law can restrain parties' independence if the effect on their self-determination is minimal and refraining from doing so could jeopardize either their own or others' self-determination.[57]

Two principled limitations circumscribe the application of relational justice to contract law.[58] Substantively, as just noted, a duty of reciprocal respect for self-determination cannot, by definition, be too onerous—an excessive burden undermines self-determination and would thus be self-defeating. Jurisprudentially, as discussed below, contract law must comply with the rule-of-law maxim of providing effective guidance to law's addressees, thereby constraining officials' ability to exercise power. Its rules, therefore, need to be relatively clear, minimizing recourse to individualized knowledge and radical ad hoc judgments, setting out categories to inform and guide the behavior of potential duty-owers.

B. Substantive Equality in Contract

Reciprocal respect for the parties' self-determination instructs contract law to proactively facilitate their cooperative efforts and may also impose on them moderate affirmative duties. Given the differences between people, reciprocal respect also implies that law must frame our contractual interactions as relationships between self-determining and substantively (rather than merely formally) equal individuals who respect one another for the persons they actually are. This means that the requirements of contract law must not be specified in complete disregard of the parties' circumstances and constitutive choices, insofar as they are crucial for the interacting parties to relate as equals and to act as self-determining agents.

Formal equality, however, is not irrelevant. In contractual settings where the parties are more or less equally situated, formal equality is, all things considered, the best proxy for substantive equality, possibly explaining

55. Arthur Ripstein, *Private Authority and the Role of Rights: A Reply*, 14 JERUSALEM REV. LEGAL STUD. 64, 80 (2017).

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

57. *Cf.* T.M. SCANLON, WHAT WE OWE TO EACH OTHER (1998), at 229–241 (discussing the possibility of discriminating between legitimate and illegitimate forms of aggregation).

58. *See* Dagan & Dorfman, *supra* note 10, at 1421–1424. A third limitation, less relevant here, involves practices, such as love or friendship, whose legal enforcement may destroy their inherent moral value and backfire by displacing internal motivations.

why the legal treatment of commercial contracts (say, between traders) largely conforms to formal equality. Contract theorists use this conformity to support the more ambitious claim that formal equality is truly the foundational ideal of contracts, either in this particular context or in general.[59] But this conclusion does not hold.

Some readers may find the view that contract law should safeguard and vindicate the parties' substantive equality alarming but, as we use this term, substantive equality instantiates the intuitively appealing principle of *treating persons as equals*.[60] We do not thereby suggest that all deviations from a standard of strict equality are objectionable, a perception that would be the antithesis of formal equality. Instead, substantive equality in private law settings is an ideal concerning just *terms* of interactions, referring to interpersonal relations uncorrupted by imbalances of power and vulnerability. Vital to the determination of these terms as just is that they reflect the relatively equal power of both parties to a voluntary transaction to make such terms, or to have reasonable expectations[61] of safety, privacy, and relevant information influence their making.

Identifying substantive equality with just terms in either of these ways is closely tied to self-determination, which defines what it means to treat contractual parties as equals. Having the power to make or contribute to the making of the contract terms offers a clear illustration—substantive equality would then mean that the self-determining agency of *both* parties is, more or less, equally evident in the authoring of these terms.[62] Self-determination also features in the assessment of substantive equality in the absence of a party's contractual voice, as when consumers are term-takers facing adhesive contracts. Terms that respect the voiceless party's interest in safety, privacy, and relevant information aim to reduce the vulnerability imbalance between the parties, focusing on these interests because of their contribution to self-determination. Diminished safety, privacy, and access to relevant information render one party vulnerable to the other precisely because these interests are so central to the weaker party's ability to interact with the other as a self-determining agent.

These refinements highlight the difference between contractual justice (and relational justice more generally) and a recent philosophical approach often referred to as relational egalitarianism. The term describes a bourgeoning body of philosophical scholarship elaborating on the familiar ideal that our relationships with others should be relationships between

59. *See, e.g.*, Daniel Markovits, *Promise as an Arm's Length Relation*, *in* Promises and Agreements: Philosophical Essays 295, 316–317 (Hanoch Sheinman ed., 2011).

60. *See* Avihay Dorfman, *Negligence and Accommodation*, 22 Legal Theory 77, 110–111 (2016).

61. *Cf.* Peter Benson, Justice in Transactions: A Theory of Contract Law (2019), at 222–223, 226–228, 232–233, 239–240.

62. We say *more or less* to emphasize that parties need not be situated strictly equally in terms of their powers (broadly conceived to include information, skill, and more). Instead, they must be situated equally enough for the terms of their interactions to reflect that both are in an authorship position.

equals.[63] Thus, at a very abstract level, contractual justice's substantive equality, which deals with a similar ideal—relating as equals[64]—may seem a straightforward application of relational egalitarianism. But the two theories diverge in their moral and structural characteristics. The differences between them pertain both to the parties' identity and to the standard of equality per se.[65]

Concerning the identity of the contracting parties, and contrary to leading accounts of relational egalitarianism, relational justice is *not* predicated on the democratic ideal of equality between members of a political community.[66] Indeed, contractual justice does not focus on the parties' standing vis-à-vis one another as citizens or turn on considerations of political or national identity. Instead, it concerns the contractual relationships between persons simply as such. Hence, whereas certain leading relational egalitarians identify relational equality with *democracy*,[67] relational justice, and its underlying ideal of substantive equality, finds its grounds in *liberalism*.

Concerning the standard of equality, the substantive conception of equality underlying relational justice departs from two leading accounts of what is wrong with relations of inequality centering on hierarchy and exploitation. According to Elizabeth Anderson, hierarchies of power, esteem, and standing are paradigmatic instances of relational inequality because they subject one party in the relation to an "inferior position."[68] According to Seana Shiffrin, relations of exploitation denote a basic failure to relate to others as free and equal agents.[69] Unlike Bagchi's account of distributive justice discussed above,[70] Shiffrin emphasizes exploitation's relational grounds.[71] On her account, contract law is morally required to refrain from facilitating one party's exploitation by the other.[72]

On our account of substantive equality, unjust terms in contractual relations rest neither on hierarchy nor on exploitation. Relations of hierarchy, as noted, are not per se impermissible if contractual terms show due regard

63. A leading contribution is Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 312 (1999). Another seminal piece is Samuel Scheffler, *What Is Egalitarianism?*, 31 PHIL. & PUB. AFFS. 5 (2003). Their accounts of relational equality differ on several significant counts but discussing them exceeds the scope of our argument here. For a thorough analysis, *see* KASPER LIPPERT-RASMUSSEN, RELATIONAL EGALITARIANISM: LIVING AS EQUALS (2018), at 57–59.

64. *See further* Avihay Dorfman, Conflict Between Equals: A Vindication of Tort Law (unpublished manuscript), at ch. 8.

65. Further distinguishing factors are developed in Dagan & Dorfman, *supra* note 43, at 181–183, 184–186.

66. Dagan & Dorfman, *supra* note 10, at 1397, 1410, 1415.

67. *See* Anderson, *supra* note 63, at 289, 317.

68. ELIZABETH ANDERSON, PRIVATE GOVERNMENT: HOW EMPLOYERS RULE OUR LIVES (AND WHY WE DON'T TALK ABOUT IT) (2017), at 127. *See also* Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks?*, 9 THEORETICAL INQUIRIES L. 239, 263–265 (2007).

69. Shiffrin, *supra* note 53. Note that, contrary to our approach, Shiffrin's notion of relationality includes the state as one of the parties at the stage of contract enforcement. *Id.* at 227.

70. *See supra* text accompanying notes 22–40.

71. Shiffrin, *supra* note 53, at 236, 245.

72. *Id.* at 224, 227–228.

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for the security, privacy, and informational interests of the term-taker party in, say, an adhesive contract. The flip side is that contractual transactions could count as relationally unjust even when the parties are not in a hierarchical relationship.

Consider finally substantive equality vis-à-vis exploitation. We argue that exploitation is a specific case of the more general category of substantive inequality. The terms of a contract may thus be deemed unjust even when they do not include one party's exploitation by the other. Terms that fail (even inadvertently) to pay sufficient attention to a party's safety or privacy do not necessarily reflect exploitation. They should still be criticized, however, due to the failure to treat both parties as equals, given the moral import of safety or privacy to the parties' ability to interact as free and equal agents.

C. Contractual Justice, Incentives, and Welfare

Our account has thus far refined the justice of contract by contrasting it with corrective justice, distributive justice, and relational egalitarianism. The focus of relational justice on the contracting parties' *terms of interaction* suggests that the subtle relationship between contractual justice and the economic analysis of contract also needs attention.

In setting up terms of interaction, contract law is not responding to ad hoc encounters between contracting parties. Contract is a legally constructed edifice and contract law's terms of interaction set the stage, establishing preconditions for interpersonal transactions that outlaw impermissible behaviors and empower parties to design their social and economic arrangements by forming rights and obligations. Contractual justice must therefore attend to the incentive effects of legal rules. Investigating these effects is crucial for any theory aiming to prescribe rules (meaning reasons for action) able to secure just results. Ensuring the justice of contracts should thus not be an afterthought of judges embarrassed by the inequitable results of contract law. The architects of just contract law must shape contract doctrine with an ex ante perspective, carefully examining the likely implications of its potentially contending configurations. Some of the following discussions of specific contractual doctrines will thus, unsurprisingly, resort to economic insights.

Our account of contractual justice, however, is not simply welfarism in disguise. Quite the contrary. The task of designing a contract law that complies with relational justice differs from that of shaping a contractual regime that maximizes social welfare. A welfare-foundationalist account of contracts treats contract law as a technology for allocating resources and entitlements so as to maximize overall welfare, unlike the understanding suggested in this article, which seriously addresses the idea of contract law as part of private law. Accordingly, contractual justice focuses on the parties and the free-standing value of their interpersonal interactions, irrespective of its putative

instrumental contribution to social welfare. Therefore, it offers lawmakers an alternative litmus test for success.[73]

First, if contract is merely a tool for maximizing social welfare, the fundamental standing rule of contract that vests standing on the parties to the contract rather than on society as a whole must be based on some *contingent* reason, such as comparative competence. By contrast, our relational account offers a *noncontingent* justification for the parties' standing as neither derivative nor dependent on their possible functioning as private attorneys general.[74]

Moreover, a genuine concern for social welfare would ultimately subordinate the contractual interaction to the dictates of the general interest. The economic analyses of contract that we rely on focus on the effects of alternative rules on the contracting parties. This is indeed the focus in much of the law-and-economics scholarship on contract,[75] but a welfare-foundationalist point of view requires a broader perspective. As Liam Murphy notes, because "[t]here is no guarantee that what is best for each contracting pair is best for all of us," a genuinely welfarist account must not take for granted that an appropriate contract rule would be the one that is best for each contracting pair.[76] Murphy's claim implies much more than the familiar (and prevalent) attention to clear cases of externalities and suggests that a welfarist analysis of contract law must focus on contracts' effects at the macro level.[77] Thus, for example, it should assess the effects of consumer law on workers and of employment law on consumers, given the pertinent numbers of both workers and consumers. It also implies that, given the new technologies that, arguably, could soon replace contract's allocative functions, freedom of contract should not be taken for granted.[78]

Finally and most fundamentally, the welfare of the parties is qualitatively different from their substantive freedom and equality. A liberal contract law grounded on relational justice that pays attention to the welfarist implications of the parties' interaction *must* also ensure that the terms of these interactions comply with the maxim of reciprocal respect for self-determination and substantive equality. It thus carefully distinguishes the features that make us who we are—our immutable characteristics and our

73. *See generally* Dagan & Heller, *supra* note 49.

74. *See* DAGAN & HELLER, *supra* note 48, at 91.

75. For a noteworthy account that explicitly discards welfare foundationalism and focuses unapologetically on the welfare of the contracting parties rather than that of society, *see* Robert E. Scott, *A Joint Maximization Theory of Contract and Regulation, in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 22 (Hanoch Dagan & Benjamin Zipursky eds., 2020).

76. Liam Murphy, *The Practice of Promise and Contract, in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT 151, 168 (Gregory Klass et al. eds., 2014).

77. *Cf.* Yair Listokin & Peter Bassine, Efficient Legal Rules in a Cyclical Economy (unpublished manuscript).

78. *See* Dagan & Heller, *supra* note 49, at 158–159.

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constitutive choices (the choices that define our ground projects)—from our brute preferences.[79]

Preferences are "active attitudes which people hold for reasons,"[80] and these reasons refer back to their plans, projects, and goals or their normative convictions. Situating the satisfaction of people's preferences in their life stories explains both the normative significance of this satisfaction and why it cannot be foundational or even freestanding. People's preferences are meaningful *because* of their role as features of personal self-determination. The maxim of equality explains why preferences of equal intensity should be counted equally, regardless of their holder's identity. Appreciating how some of our preferences are grounded in our normative convictions further refutes the plausibility of treating all preferences as "opaque natural events."[81] Both directions thus suggest that, at times, it is inappropriate to be guided—or solely guided—by the criterion of maximizing preference satisfaction.

Hence, notwithstanding the overlapping (ex ante) perspective and the convergence of some of our prescriptions with those of the economic analysis of contract law, other (significant) prescriptions of our account differ from those favored by lawyer economists. Thus, as we show below, relational justice (unlike economic analysis) accounts for the immutability of safety warranties, the emphasis of unconscionability on the weaker party's vulnerability, and the focus of disclosure doctrine on cases of clear asymmetry between the parties' capabilities.

D. From Justice to Law

Even for readers who may find our normative account persuasive, the difficulty of translating the normative commitment to contractual justice into legal doctrine may still evoke valid concern. To illustrate the problem, and as a prelude to the doctrinal survey that follows, we begin with Laidlaw v. Organ,[82] a familiar old case that captures the laissez-faire approach to contract law.

Organ purchased 111 hogsheads of tobacco from Laidlaw on February 18, 1815, *after* learning that the Treaty of Ghent had ended the War of 1812 and thus the British blockade of New Orleans, but *before* the news about the treaty became public. When calling the seller to complete the purchase, Organ was asked if he was aware of any reason for the price to be higher but remained silent, and the purchase was completed at the depressed price agreed upon due to the naval embargo. Laidlaw delivered the tobacco to Organ but repossessed it after realizing that its value had risen dramatically once the embargo was lifted. Laidlaw argued that

79. *See supra* Section I.A. For more, *see* Dagan & Dorfman, *supra* note 10, at 1418–1419, 1432.
80. Joseph Raz, Ethics in the Public Domain (1994), at 112.
81. *Id.*
82. Laidlaw v. Organ, 15 U.S. (2 Wheat.) 178 (1817).

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"[s]uppression of material circumstances within the knowledge of the vendee, and not accessible to the vendor, is equivalent to fraud, and vitiates the contract."[83]

The debate between opposing counsel was both factual and normative. Factually, Organ claimed that his silence "might as well have been interpreted into an *affirmative* as a *negative* answer," while Laidlaw claimed that it "was equivalent to a false answer," making this "a case of manoeuvre; of mental reservation; of circumvention." Normatively, they debated the cogency of *caveat emptor*. Organ defended *caveat emptor* against the allegedly excessive (for law) moral requirement, and insisted that Laidlaw's contention relies on "romantic equality." Laidlaw responded that, in this respect, "[t]he rule of law and of ethics is the same. It is not a romantic, but a practical and legal rule of equality and good faith that is proposed to be applied."[84]

Chief Justice Marshall's unanimous opinion remanded the case to the district court of Louisiana for the limited purpose of a jury decision on "whether any imposition was practised by the vendee upon the vendor."[85] The question was whether Organ's silence conveyed a "nonliteral and implicit meaning,"[86] that is: whether it was tantamount to active concealment. But Marshall refused to go beyond that and rejected Laidlaw's broad normative claim, which implied an *affirmative* duty of disclosure.

While it is accurate to view *Laidlaw* as a classic example of a laissez-faire approach to contract, a careful reading of Marshall's reasoning may shed new light on its underpinnings. "The question in this case," he stated, "is whether the intelligence of extrinsic circumstances, which might influence the price of the commodity, and which was exclusively within the knowledge of the vendee, ought to have been communicated by him to the vendor?" Marshall answers that the vendee (Organ) "was not bound to communicate it," without even engaging the normative debate of opposing counsel. Rather, the line he draws between the duty not to conceal that this case begins to articulate, and the lack of any obligation to disclose that it also stands for, relies on a different type of argument: "[i]t would be difficult to circumscribe the contrary doctrine within proper limits, where the means of intelligence are equally accessible to both parties."[87]

This is a weighty argument even if, as we have argued, the corrective justice ideal of interpersonal independence is indefensible. It shifts the spotlight from substance to form and institutional competence implying that, in order to vindicate the turn of contemporary contract law from corrective

83. *Id.* at 184–185.
84. *Id.* at 190, 193–194.
85. *Id.* at 195.
86. Gregory Klass, *Meaning, Purpose, and Cause in the Law of Deception*, 100 GEO. L.J. 449, 458 (2012).
87. *Laidlaw*, 15 U.S. at 195.

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to relational justice, we need to consider the difficulty of specification stressed by Marshall.

The challenge is twofold. First, the rule-of-law maxim requires giving duty-owers effective guidance, thus constraining the ability of officials to exercise power.[88] This maxim, which is deeply ingrained in any autonomy-based legal regime, requires law to set out clear doctrines for individuals to adequately discharge their duties. But delineating a doctrine compliant with the rule of law that implements relational justice in the precontractual context often involves complex analyses of systemic social data and may even require setting up detailed regulatory schemata.

Another difficulty derives from possible gaps between prescriptions and effects. Legal norms do not transparently translate into their intended actions because many of the norms' potential addressees may have vested interests in circumventing these actions' intended effects. Well-informed and sophisticated parties are likely to take law's prescriptions, even if presented as reasons for action, as incentives rather than norms. In other words, they may behave like Holmes's image of the bad man, looking at norms as a list of prices for particular behaviors.[89] Contract law must not ignore these potential responses. Since the concern of contractual justice is to set up just terms for people's interactions prospectively and constructively, any doctrine guided by contractual justice must consider the contingency of such responses, with particular attention to the possibility that these responses could end up undermining the doctrine's goals.

These difficulties pertain, particularly, to judge-made law. But contract law, like private law more generally, is *not* reducible to common law. Its promulgation and adjudication are not confined to judges' chambers. Rather, as our discussion thus far implies, private law—whether the product of judges, legislatures (like the Uniform Commercial Code), or regulators (like many of the contexts discussed in Section III)—is the law that governs our interpersonal relationships and stands in contrast to public law, which governs our interactions as citizens. Private law's core responsibility is to structure just interpersonal interactions. While the contingent history of common law as a central locus for the development of contract law plausibly justifies the view associating contract law and adjudication, judge-made law is certainly not the exclusive path for instantiating contractual justice. Quite the contrary. The institutional limitations of the judiciary may render common law incomplete or even inappropriate for the task in our increasingly complex, interconnected environment.

88. Guidance and constraint, two key elements of the rule of law, feature already in John Locke's argument that "both the People may know their Duty, and be safe and secure within the limits of the Law, and the Rulers too kept within their due bounds." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT (Peter Laslett ed., 1988), at 378.

89. *See* OLIVER WENDELL HOLMES, *The Path of the Law*, *in* COLLECTED LEGAL PAPERS 167, 171 (1920).

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Contract law beyond common law was not viable in the laissez-faire era. It is increasingly becoming the typical feature of our complex legal environment, however, which explains why some of the law that follows is not—or not solely—the product of the judiciary. Legislation and regulation are often useful, and sometimes essential, for establishing and developing the legal infrastructure of interpersonal interactions in modern societies. Deviating from the court-centered view of contract law may be necessary to ensure the generality of legal prescription, maintain the required technological expertise for legal decision-making, and target systemic failures that can hardly be addressed at a transactional, case-by-case level. It may also be required to deploy effective tools for proactive (as opposed to reactive) ex ante guarantees of just contractual relationships in various settings and to ensure they are predictable enough to guide people's behavior effectively, as required by the rule of law.[90]

III. PRECONTRACTUAL LAW

We now move on from legal theory to legal doctrine, focusing on the most basic legal rules of precontractual justice. Our tasks are straightforward. The first is to show that the liberal commitment to relational justice can justify a broad swath of core contract doctrine and account for its shape and direction. Though the theory-to-doctrine fit is not perfect, it is closer than that between economic analysis and these doctrines and superior to all competing accounts of the justice of contract. Our second task is to demonstrate that, although translating the abstract maxim of relational justice into specific legal prescriptions is a complex and subtle assignment, it does not pose an insurmountable challenge, at least when judges, legislators, and regulators cooperate in the attempt to meet it.

A. Ignorance and Nondisclosure

Some parts of the law of fraud need not rely on an understanding of interpersonal relationships in relational justice terms. Like active misrepresentation, both manipulative half-truths and concealment of undisclosed information are offensive even in a laissez-faire vision of interpersonal independence—all involve someone attempting to influence another's behavior.[91] They can thus easily be viewed as a misrepresentation because neither one imposes an affirmative duty to attend to another person's predicament and both are consistent with *caveat emptor*.[92]

90. *See* Dagan & Dorfman, *supra* note 10, at 1436–1437; Hanoch Dagan & Roy Kreitner, 52 *The Other Half of Regulatory Theory*, 52 CONN. L. REV. 605 (2020).

91. Gregory Klass, *The Law of Deception: A Research Agenda*, 89 U. COLO. L. REV. 707, 715 (2018). *See also, e.g.*, Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 388 (1888).

92. *See, e.g.*, W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEXAS L. REV. 1, 5 (1937).

A different justification is needed for the rule currently enshrined in the Restatement, which imposes a duty to disclose if a party "knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if nondisclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing."[93] This rule, which typifies contemporary law even though it is not universally followed,[94] reflects an attempt to repudiate *caveat emptor*.[95] It defies the Supreme Court's proud declaration of 1871 stating that "[n]o principle of the common law has been better established, or more often affirmed" than "the maxim of *caveat emptor*."[96] (This normative shift also underlies the doctrine of unilateral mistake.[97])

Delineating the scope and contours of this vague and open-ended duty of disclosure is not always simple. Thus, determining what facts must be disclosed to the buyer in the classic casebook example of selling a private home may not be trivial given that most homeowners have vast and unique knowledge of their property and of myriad factors that can affect its value. Some of these question marks can be and have been alleviated through the accumulation of case law.[98] Common law, however, given its casuistic method and incrementalist progress, may not always be the appropriate tool for this task.

Adjudication, then, may no longer be the sole or even the main source of disclosure law. After the judicial establishment of a precontractual disclosure requirement for private homes, most states—following California's lead—have set up statutory schemes detailing the mandatory disclosures in a Real Estate Transfer Disclosure Statement.[99] While these statutes "do not purport to pre-empt the evolving common law,"[100] they provide a complying seller some reasonable assurance.[101] In other contexts, notably regarding securities, action has dramatically shifted to a specialized regulatory apparatus. Thus, the Securities and Exchange Commission (SEC) requires "public companies to disclose meaningful financial and other information to the public," so that investors can "have access to certain basic facts about an investment prior to buying it, and so long as they

93. Restatement (Second) of Contracts §161(b) (1981).

94. *See, e.g.*, Stambovsky v. Ackley, 169 A.D.2d 254, 257 (N.Y. 1991).

95. *See, e.g.*, Obde v. Schlemeyer, 353 P.2d 672, 674–675 (Wash. 1960); Weintraub v. Krobatsch, 317 A.2d 68, 71–75 (N.J. 1974); Reed v. King, 145 Cal. App. 3d. 261, 265 (1983).

96. Barnard v. Kellogg, 77 U.S. 383, 388 (1871).

97. *See* Restatement (Second) of Contracts §153 (1981).

98. *See* Robert M. Washburn, *Residential Real Estate Condition Disclosure Legislation*, 44 DePaul L. Rev. 381, 390 (1995).

99. *See* Eric H. Franklin, *Mandating Precontractual Disclosure*, 67 U. Miami L. Rev. 553, 583–584 (2013).

100. George Lefcoe, *Property Condition Disclosure Forms: How the Real Estate Industry Eased the Transition from* Caveat Emptor *to "Seller Tell All"*, 39 Real Prop. Prob. & Tr. J. 193, 226 (2004).

101. *See* Alex M. Johnson, *An Economic Analysis of the Duty to Disclose Information: Lessons Learned from the* Caveat Emptor *Doctrine*, 45 San Diego L. Rev. 79, 114 (2008).

hold it."[102] Resort to institutional expertise is likely to gain even more traction given the current knowledge about the systemic difficulties confronting mandated disclosures.[103]

These operational challenges are crucial for creating and sustaining a legal regime supportive of just precontractual relationships. But our main focus here is more foundational: to fine-tune the normative commitment underlying precontractual disclosure duties as a principled basis for these architectural refinements to flourish. The literature offers two prominent attempts to account for the emerging (residual) case law of precontractual disclosure: one is based on social welfare and the other on distributive justice.

The premise of Anthony Kronman's analysis is that social welfare is served when the most accurate information as to the relative value of commodities and other entitlements reaches the market as soon as possible. A precontractual duty to disclose casually discovered information is thus justified because this obligation creates an incentive conducive to allocative efficiency. By contrast, no such duty should be imposed when the information involved was acquired deliberately so as not to discourage the costly production of this type of data.[104]

Kim Scheppele focuses on allocative fairness rather than efficiency. She argues that precontractual disclosure duty is aimed at a distributive ideal of equal access, which ensures that the parties "(1) have equal probabilities of finding the information if they put in the same level of effort and (2) are capable of making this equivalent level of effort."[105] To ensure equal access, Scheppele argues, law must impose a duty to disclose "deep secrets," meaning relevant information that the other side neither knows nor even suspects exists. Other types of information—"shallow secrets"—do not threaten equal access and, therefore, are not subject to a similar duty.[106]

Both accounts face a descriptive difficulty. Kimberly Krawiec and Kathryn Zeiler's thorough empirical analysis of disclosure cases demonstrates "that courts are no more likely to impose disclosure duties when the information is casually acquired as opposed to deliberately acquired, and that unequal access to information by the contracting parties is not a significant factor that drives courts to find a duty to disclose."[107] Moreover, even if we set

102. *What We Do*, U.S. SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/Article/whatwedo.html.

103. *See, e.g.*, OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

104. *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 12–18 (1978). *See also, e.g.*, MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT (1993), at 108, 112, 117–118.

105. KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW (1988), at 120.

106. *Id.* at 77–78.

107. Kimberly D. Krawiec & Kathryn Zeiler, *Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, 91 VA. L. REV. 1795, 1800 (2005). Krawiec and Zeiler also show that "courts actually have become *less* likely over time to impose duties to disclose." *Id.*

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aside the question of fit, both accounts seem unsatisfactory because they rely on concerns—aggregate welfare and distributive justice—that, though not necessarily alien to private law, transcend its interpersonal normative core.[108]

The pattern of liability for nondisclosure developed in the courts according to Krawiec and Zeiler's account is best justified in relational justice terms. While refuting the descriptive power of both Scheppele's and Kronman's accounts, Krawiec and Zeiler conclude that what makes courts "significantly more likely to force disclosure" is the *combination* of clear asymmetry between the parties' capabilities—where one was "illiterate, elderly, severely ill, or extraordinarily mentally deficient in some way (although still competent to contract)"—and casually acquired information.[109] This pattern applies to all contract cases—and particularly to those that are not governed by domain-specific rules that would be reflected in market prices—and is thus especially helpful for exposing the normative intuitions underlying disclosure law.

Krawiec and Zeiler's account of the actual workings of the law—arguably tracing the intuitive appeal of law's split from laissez-faire that is also the starting point of this article—echoes the prescriptions of relational justice. It reflects an understanding of the parties' interaction as an exercise in interpersonal cooperation, where each party enlists the other in pursuit of its goal while respecting the other's self-determination and substantive equality. Where formal equality can serve as a proxy for substantive equality, each party can legitimately focus on its own interests. But where formal equality no longer ensures substantive equality, as is clearly the case where one party's capability for finding relevant information is dramatically lower than the other's, a duty of accommodation (here, of disclosure) may arise. Finally, as is usually true of relational justice, the burden of its accommodation duties must not be excessive and, in particular, cannot undermine the other party's autonomy and equal standing. Therefore, not every case of asymmetry justifies the imposition of a disclosure duty, especially when such a duty would preclude the parties' use of valuable information they have legitimately acquired in pursuit of their own life plans.

B. Harsh Circumstances and Duress

The idea that duress overrides the promisor's free will may seem appealing.[110] Following Justice Holmes, however, courts and commentators largely acknowledge that duress must be defined by the fact that the promisor has

But as they acknowledge, "other factors, such as the codification of certain areas of fraudulent silence law through statutes that mandate particular disclosures, [might have] altered the type of case that survives to litigation under the common law." *Id.* at 1881.

108. *Cf.* Alan Strudler, *Moral Complexity in the Law of Nondisclosure*, 45 UCLA L. Rev. 337, 340, 354–356, 368, 370 (1997).

109. *See* Krawiec & Zeiler, *supra* note 107, at 1800, 1815, 1853–1855, 1864.

110. *See, e.g.*, 13 Williston on Contracts 704 §1617 (3rd ed. 1970).

"to choose the lesser of two evils,"[111] so the baseline for duress is necessarily normative.[112] A contract is voidable by a victim of duress if her "manifestation of assent is induced by an *improper* threat by the other party that leaves the victim no *reasonable* alternative."[113]

The common law of duress developed gradually, expanding along two dimensions, both of them relevant here.[114] First, while courts originally "restricted duress to threats involving loss of life, mayhem or imprisonment, . . . these restrictions have been greatly relaxed and, in order to constitute duress, the threat need only be improper."[115] Contemporary duress law goes far beyond threats to commit a crime or a tort to include cases that "amount to an abuse of [the bargaining] process."[116] Second, while the impact of the threat was for centuries judged against the standard of "ordinary firmness,"[117] contemporary law looks at "the person claiming to be the victim of duress" and considers all "attendant circumstances" and "infirmities," including such matters as the age, background, and relationship of the parties.[118]

These pronouncements of the Restatement (Second) of Contracts, which reflect much of the judicial discourse on duress, echo our conception of contractual justice, both in their broad understanding of improper threats and in their explicit reference to the parties' pertinent features. But a critical reading of the cases may lead to a more cautious conclusion: duress doctrine, as one commentator noted, "remains largely unused," and courts continuously "struggle with defining [its] parameters."[119]

In particular, the common law of duress still requires the promisee to assume some responsibility for the promisor's distress so that sheer exploitation of this distress is not deemed to be duress.[120] This limitation cannot be interpreted as a normative endorsement of corrective justice, which is incompatible with duress law's *broad* understanding of "wrongful" threats, including its famous inclusion of threats to do what one has a legal right to do.[121] This doctrinal underinclusiveness, however, is still disappointing. To exploit another person's harsh circumstances may indeed be less

111. Union Pac. R. v. Public Serv. Com'n, 248 U.S. 67, 70 (1918).

112. *See, e.g.*, Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 LEGAL THEORY 45, 53–54 (2002).

113. RESTATEMENT (SECOND) OF CONTRACTS §175(1) (1981).

114. *See* John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 253–256 (1947).

115. RESTATEMENT (SECOND) OF CONTRACTS §175 cmt. a (1981).

116. RESTATEMENT (SECOND) OF CONTRACTS §176 & cmt. a (1981).

117. Dawson, *supra* note 114, at 255.

118. RESTATEMENT (SECOND) OF CONTRACTS §175 cmt. c (1981).

119. Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 444, 446 (2005).

120. *See* JOSEPH M. PERILLO, CONTRACTS (7th ed., 2014), at 292.

121. *See, e.g.*, Dawson, *supra* note 114, at 287–288.

wrong than to create them but, in some cases, taking advantage of another is outrageous enough to run afoul of relational justice.[122]

And yet, except for extreme cases, this consistent *judicial* position[123] may be understandable. Although exploitation and duress often go hand in hand, providing a clear criterion independent of market considerations for what constitutes illegitimate exploitation that courts can invariably rely upon can be challenging.[124] Besides this line-drawing problem, duress is a paradigmatic instance of the risk, also noted above, of potentially counterproductive consequences. Attending to these consequences may be surprising to readers who expect a theory of justice to take the ex post position, but our theory's focus on the ex ante construction of just contractual relationships makes the expected consequences of legal doctrine a foremost concern.

According to Oren Bar-Gill and Omri Ben-Shahar, who study this difficulty, when a promisor surrenders to a *credible* threat—that is, when the threatening party is likely to carry out his threat if his demands are not met—"her wellbeing might be better served if the law were to deem her act voluntary and give it ordinary effect." The reason is that, if "antiduress rules would later invalidate the threatened party's surrender," the threatening party "would not bother to make the threat" but "simply do that which he would otherwise threaten to do." A rule with this effect, then, sets aside "a choice between two evils" only by leaving the threatened party with "the greater of the two evils." To evaluate cases that raise this dilemma, one needs to inquire whether contract law's refusal to enforce expensive, coercive transactions such as loans, for example, could lead putative lenders to make the loan even for a lower rate of return or leave potential borrowers without any loans at all.[125]

This "feasibility constraint" implies that the traditional judicial response to duress can effectively address relational injustice only insofar as it relates to threats that are not truly credible (namely, bluffs). For credible threats, a more robust remedy is needed to change "the incentives of the threatening party, by inducing him to refrain from either carrying out the threat or making it in the first place." Such credibility-reducing policies may resort to nonlegal sanctions or to legal ones (civil or criminal) that go beyond the threat of invalidation and, at times, even this expanded repertoire may not suffice.[126]

122. *See* Alan Wertheimer, Coercion (1987), at 40–41; Jonathan Wolff, *Structures of Exploitation*, *in* Philosophical Foundations of Labour Law 175 (Hugh Collins et al. eds., 2018). *Cf.* Charles Fried, Contract as Promise (rev. ed. 2015), at 110–111.

123. *See, e.g.*, Cabot Corp. v. AVX Corp., 448 Mass. 629, 638 (2007); Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 77 (2012). Among the few notable exceptions, *see* Justice Frankfurter's dissent in United States v. Bethlehem Steel Corp., 315 U.S. 289, 326, 330–331 (1942).

124. *See* Wertheimer, *supra* note 122, at 226; Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 Va. L. Rev. 79, 87–89 (1981).

125. Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 Tex. L. Rev. 717, 718–719, 724, 728–729 (2005).

126. *Id.* at 720, 730–736, 779.

The analysis of Bar-Gill and Ben-Shahar focuses solely on the threatened party's well-being. They imply that, for this category of cases, when law cannot affect the threatening party's incentives, enforcement is the sole normatively credible way, and allowing a duress claim is unambiguously counterproductive. For us, this category incorporates a set of (possibly divergent) hard cases that raise a difficult choice: either allowing the use of contract for interactions that undermine relational justice or limiting it in ways that could prove severely detrimental to the well-being of the weakest segments of society.

Many (most?) other cases, however, are different. Sheer invalidation may be counterproductive but contract law—properly understood as the law governing contractual relationships whatever its institutional pedigree—can resort to other (or further) means. Neither the need for line-drawing nor the potentially complex credibility analysis dismisses law's *principled* judgment of contractual justice. Both, however, imply what lawyers already know: proper translation of the demands of justice into legal doctrine often involves complex questions of fact and legal architecture. At times, these complications suggest that other legal actors, rather than judges, enjoy a comparative advantage in the creation of contract law rules.[127]

Usury is a familiar case in point. As Alan Wertheimer notes, usury laws, which specify a ceiling on allowable interest rates,[128] "may be thought of as a second-best device for preventing certain forms of deception and duress that cannot be attacked more directly."[129] But legislation on this topic has gone further. Anti-price-gauging laws have been enacted to date by thirty-five states and the District of Columbia, using a variety of legal techniques that include restitution, civil penalties, and criminal sanctions. Like usury law, these laws play a role in prescribing the floor of contract law by precluding "merchants from selling certain necessities such as food, medicine, fuel, or other emergency supplies for . . . a price significantly higher than the average price on a day prior to the natural disaster or state of emergency."[130]

These legislative schemes should not imply that judges cannot or should not take part in this complex endeavor. Indeed, as early as 1857, the Supreme Court held in Post v. Jones that "[c]ourts of admiralty will enforce contracts made for salvage service and salvage compensation [only] where the salvor has not taken advantage of his power to make an unreasonable bargain," but "will not tolerate" contracts in which a salvor "avail[s] himself

127. *Cf.* Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603, 625 (1943).

128. *See* https://www.csbs.org/50-state-survey-consumer-finance-laws (a table of all usury state laws).

129. WERTHEIMER, *supra* note 122, at 238–239. *See also, e.g.*, Winnick v. Aetna Acceptance Co., 275 Ill. App. 438, 443–444 (Ill. App. Ct. 1934).

130. Nicolas Cornell & Sarah E. Light, *Wrongful Benefit and Arctic Drilling*, 50 U.C.D. L. REV. 1845, 1864–1865 (2017).

of the calamities of others to drive a bargain."[131] As Bar-Gill and Ben-Shahar explain, by nullifying the agreement and replacing the exorbitant contract price with a lower, court-determined fee, Post v. Jones was able to ensure the substantive fairness of the contract, while avoiding discouraging salvage in similar situations. Furthermore, the ensuing "doctrinal guidelines determining the magnitude of this reasonable fee eliminate the potential credibility of the salvor's threat to sail away," thus ensuring that "performing the salvage operation is incentive compatible for the salvor."[132]

These three important categories of relatively tailored ways that contract law (properly understood) resorts to in cases of duress should not be viewed as aberrations or as merely "regulatory" exceptions. Instead, they exemplify a principled position for the law of contractual duress, stressing its broad understanding of improper threats and its attention to the contracting parties' pertinent characteristics. The task of this law is not to guard people's interpersonal independence (or, for that matter, ensure distributive justice), but to preserve the integrity of the bargaining process or, more specifically, its compliance with relational justice. Duress doctrine—by no means fully, let alone perfectly—faces the complex challenge of complying with relational justice while attending to its feasibility constraints and adhering to the rule of law. But appreciating the normative commitment that should guide the law of duress, its challenges, and these three stories of (relative) success, does imply that current law already possesses at least some of the resources needed for addressing and hopefully reforming its remaining shortfalls.[133]

C. Vulnerability and Unconscionability

We now turn to our third and last precontractual doctrine—unconscionability, which powerfully exemplifies both the substantive and the jurisprudential prongs of our thesis. Unconscionability doctrine represents a dramatic departure from the laissez-faire understanding of the parties' interpersonal responsibilities in terms of noninterference.[134] A contract "should not be enforced," as per the famous holding in Williams v. Walker-Thomas Furniture, "when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms." In other words, a contract or a contract term will be invalidated, even without *active* interference with the weaker party's will, when two conditions apply to it: "an absence of

131. Post v. Jones, 60 U.S. (19 How.) 150, 160 (1857).

132. *See* Bar-Gill & Ben-Shahar, *supra* note 125, at 777–778.

133. One context that reformist attention should be channeled to is prenuptial and separation agreements. *See* Hanoch Dagan, *Intimate Contracts and Choice Theory*, 18 Eur. Rev. Cont. L. (forthcoming 2022).

134. For a heroic attempt to reconcile unconscionability with interpersonal independence, *see* Peter Benson, *The Unity of Contract Law*, *in* The Theory of Contract Law: New Essays 118, 185–198 (Peter Benson ed., 2001); Benson, *supra* note 61, at 167–191. For its critique, *see, respectively*, Dorfman, *supra* note 38, at 29–30 n.88; Dagan, *supra* note 48, at 1259–1263.

meaningful choice," *and* "contract terms which are unreasonably favorable to the other party."[135] These two conditions are sometimes identified as procedural and substantive unconscionability, a distinction coined by Arthur Leff to refer, respectively, to "bargaining naughtiness" and to "evils in the resulting contract."[136]

This canonical formulation explains why relational justice—the requirement of reciprocal respect for self-determination and substantive equality—is unconscionability's obvious home. To begin with, it manifests contract law's attempt to draw a line between legitimate forms of taking advantage of one's superior bargaining power on the one hand, and exploitation, which implies using the other party's vulnerability to secure a benefit, on the other. The exploitative interaction of another being exceeds legitimate advantage-taking because it degrades the other's value.[137] Since contract relies on a requirement of reciprocal respect for self-determination and substantive equality, contract law must ensure that contracts do not become a tool of exploitation. Thus, as the Restatement notes, while a bargain "is not unconscionable merely because the parties to it are unequal in bargaining position," it may become so in cases of "gross inequality of bargaining power," as when the weaker party suffers from "physical or mental infirmities, ignorance, illiteracy or inability to understand the language of the agreement."[138] These features are largely irrelevant from a welfarist perspective that views a lack of meaningful choice as merely a potential source of misallocation.[139] But they are obviously significant to relational justice.

The replacement of "unequal" with "gross inequality" as a threshold for triggering unconscionability is also sound in terms of relational justice's underlying commitment to substantive equality. Recall that this commitment does not require tackling all deviations from a standard of strict equality. Rather, substantive equality requires contracting parties to relate as equals either by *co*-authoring/influencing the determination of the terms of the interaction or by satisfying the reasonable expectations of typical term-takers. Contracting parties must be situated *sufficiently* equally so as to enable the weaker party to understand the economic and legal risks implicit in these terms or assume responsibility for their possible materialization. Judging what counts as sufficiently equal is fundamentally

135. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

136. Arthur Allen Leff, *Unconscionability and the Code-Emperor's New Clause*, 115 U. PA. L. REV. 485, 487 (1967).

137. This understanding of exploitation draws on—but does not simply duplicate—Robert Goodin's and Ruth Sample's accounts. *See, respectively*, Robert E. Goodin, *Exploiting a Situation and Exploiting a Person*, *in* MODERN THEORIES OF EXPLOITATION 166, 166–167, 185–189 (Andrew Reeve ed., 1987); RUTH J. SAMPLE, EXPLOITATION: WHAT IT IS AND WHY IT'S WRONG (2003), at 57, 81.

138. RESTATEMENT (SECOND) OF CONTRACTS §208 cmt. d (1981).

139. *See* Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1266–1268 (2003).

open-ended, which justifies setting the legal bar of unequal bargaining power no lower than "gross inequality."

Implementing a legal doctrine of conscionability, however, is far from simple. Consider Walker-Thomas's celebrated cross-collateralization clause. When a term is one-sided, abstaining from enforcing it could end up depriving weaker parties like Williams of the opportunity to transact (by making credit less available or prices higher) rather than cleansing such transactions from injustice.[140] Insights from behavioral law-and-economics do demonstrate that such counterproductive consequences are less frequent than what a simple pricing analysis might suggest. Most buyers, not necessarily only vulnerable ones, tend to rely on heuristic techniques and make their choices based on just a few critical attributes. They may also underestimate, due to characteristic judgment biases, the risk-adjusted costs of potential default. In both cases, the implication is similar: buyers are likely to underprice the cost of inconspicuous offensive clauses, and market forces are expected to encourage sellers to include them in their contracts.[141] But even when these potential effects are taken into account, the concern remains: refusing to enforce these clauses could be most harmful precisely to the most disadvantaged.

This difficulty, along with the rule-of-law concerns that unconscionability is particularly vulnerable to, may account for the post-*Williams* institutional shift of the doctrine's evolution. As Anne Fleming demonstrates, the *Williams* litigation "catalyzed a process of legislative change." Reformers, Fleming reports, "sought to preserve unconscionability as a defense for poor borrowers but also pushed for statutory protections that would create bright-line boundaries for installment sellers and buyers." Thus, "*Williams* played a role in creating a 'law of the poor' consumer in the District of Columbia" by triggering the "enactment of statutory reforms" aimed at injecting "some measure of equality and fairness" into "the low-income marketplace."[142]

A comprehensive picture of the legal regime responsible for contractual justice cannot be limited to common law and should also include statutory schemes dealing with contract types affected by structural imbalances of bargaining power, such as consumer contracts and employment contracts.[143] Our account here will focus on the thick statutory schemes that address the exploitation of weak consumers like Williams, which often include a specialized regulatory apparatus.[144] Thus, states' Unfair

140. *See* Epstein, *supra* note 7, at 306–308.

141. *See* Russell Korobkin, *A "Traditional" and "Behavioral" Law-and Economics Analysis of* Williams v. Walker-Thomas Furniture Company, 26 U. Haw. L. Rev. 441, 458–465 (2004); Korobkin, *supra* note 139, at 1206, 1222–1244.

142. Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 Geo. L.J. 1383, 1388–1389, 1391 (2014).

143. *Cf.* Emmanuel Voyiakis, Private Law and the Value of Choice (2017), at 193, 198.

144. On employment contracts, *see* Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and the Law of Work*, 23 Theoretical Inquiries L. (2022).

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and Deceptive Practices Acts[145] establish a private right of action and entrust government officials (usually the state attorney general and, in some cases, municipal consumer protection officers at the city and county level too) with the authority to administer and enforce these rules.[146] The Federal Trade Commission also actively regulates consumer transactions, taking action in areas like misleading advertising, coercive or deceptive sales techniques, and marketing campaigns preying on the young, the elderly, or the infirm.[147]

Finally, consider the Consumer Financial Protection Bureau (CFPB). Title X of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act created the CFPB,[148] investing it with "rulemaking, enforcement, and supervisory powers over many consumer financial products and services, as well as the entities that sell them."[149] Part of its rulemaking activity relies on a set of (eighteen) preexisting federal statutes, such as the Truth in Lending Act, the Truth in Savings Act, the Fair Credit Billing Act, and the Fair Debt Collection Practices Act. In addition, the CFPB enjoys "organic authority" to define "certain acts and practices as unfair, deceptive, or abusive."[150] The Act explicitly includes under the rubric of abusive acts or practices not only one that "[m]aterially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service," but also one that "[t]akes unreasonable advantage" of the consumer's "lack of understanding" of "the material risks, costs, or conditions of the product or service," her inability to protect her "interests in selecting or using a consumer financial product or service," or her "reasonable reliance" on an intermediary "to act in the interests of the consumer."[151]

All these regulatory schemes, as noted, supplement rather than replace the common law doctrine of unconscionability. This doctrine is far from clearly settled, but two emerging patterns in it match the interpretation of it we have suggested here. First, the judicial test for substantive unconscionability asks whether a contract term, analyzed independently from the rest of the contract, is "overly harsh," "unduly one-sided," or "shocks the conscience." As Russell Korobkin observes, this question may help to

145. *See* NATIONAL CONSUMER LAW CENTER, CONSUMER PROTECTION IN THE STATES: A 50-STATE EVALUATION OF UNFAIR AND DECEPTIVE ACTS AND PRACTICES LAWS app. C (2018).

146. *See* DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW §§7:1, 7:28 (2014 ed.).

147. *See id.* at §§11:1, 9:10, 10:1, 9:11; J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 12 GEO. MASON L. REV. 873 (2004).

148. *See* Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), P.L. 111-203, 12 U.S.C. Ch. 53 §§5481–5603.

149. DAVID H. CARPENTER, CONG. RSCH. SERV., R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL ANALYSIS 1 (Jan. 14, 2014), https://www.fas.org/sgp/crs/misc/R42572.pdf.

150. Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 344 (2013).

151. Dodd-Frank Act §1031(d), 12 U.S.C. §5531(d). *See also* Dagan & Kreitner, *supra* note 90, at 637–641.

identify offensive terms that, due to features of consumers' behavior noted above, cannot be disciplined by market forces.[152] Refusal to enforce such terms would thus not confront the feasibility constraint highlighted by Bar-Gill and Ben-Shahar.

The second pattern goes beyond the point of convergence between accounts—like Korobkin's—solely focused on the parties' well-being and others—like ours—committed to constructing people's contractual relationships as interactions between self-determining and substantively equal agents. Relational justice, as stated above, provides a normative bulwark against the self's welfarist subordination by drawing a qualitative distinction between the features that make us who we are and our brute preferences. It thus calls for particularly exacting scrutiny of terms that might undermine the weaker party's ability to pursue a meaningful life.[153] This qualitative distinction between people's constitutive and welfarist interests can justify the courts' willingness to strike out facially offensive terms in lease contracts and employment contracts.[154] It also vindicates the rule whereby "[l]imitation of consequential damages for injury to the person in the case of consumer goods is prima facie unconscionable but limitation of damages where the loss is commercial is not."[155] This trend has been developed still further in modern products liability law, which has transformed warranties of safety into *immutable* duties owed to consumers.[156]

CONCLUDING REMARKS

Contractual justice, we argued in this article, is a special case of relational justice. The various common law and statutory rules governing ignorance (re nondisclosure), harsh circumstances (re duress), and vulnerability (re unconscionability) differ significantly. Some of the disparities between them derive from the challenges of confronting the translation of contractual justice's moral demands into a rule-of-law-friendly doctrine properly sensitive to its ultimate incidents; others reflect the usual gap between a theory's ambition to normative coherence and a legal doctrine's susceptibility to the complexities of real life. The normative pull common to all these doctrines, however, is still quite robust—all of them have a share in the construction of just contractual relationships. These doctrines can, and indeed should, be interpreted and developed further as instantiations of the liberal commitment to reciprocal respect for self-determination and substantive equality.

152. Korobkin, *supra* note 141, at 467.

153. Sabine Tsuruda, therefore, is correct when pointing to unconscionability—and, we add, relational justice more generally—as contract law's doctrinal home for addressing structural injustices. *See* Sabine Tsuruda, Resistance and Recognition in Contract (unpublished manuscript).

154. *See, respectively*, Seabrook v. Commuter Hous. Co., 338 N.Y.S.2d 67 (Civ. Ct. 1972); Armendariz v. Found. Health Psychcare Servs. Inc., 6 P.3d 669 (Cal. 2000).

155. U.C.C. §2-719(3).

156. *See* Greenman v. Yuba Power Prods., Inc. 377 P.2d 897, 901 (Cal. 1963).