Taking Raz Seriously: On the Value of Autonomy and its Relation to Private Law

JE Penner[[1]](#footnote-1)\*

Draft – do not cite, etc

1. Introduction

For private law theorists, autonomy seems to be in the air. I have recently come across a number of papers[[2]](#footnote-2) in which the concept of autonomy is called upon to explain, and possibly justify, some private law doctrine. The most prominent proponent of this approach is, of course, Hanoch Dagan, whose two most recent books give it a full-throated endorsement.[[3]](#footnote-3) I do not propose to examine Dagan’s work in detail, though I shall discuss some aspects of his and Michael Heller’s ‘choice’ theory of contracts. Instead I shall raise some general considerations about the relevance of Raz’s theory of autonomy to private law. I hope to show that Raz’s theory of autonomy meshes pretty seamlessly with what I shall call a Kantian instrumentalist account of private law, pointing out an aspect of his theory which I don’t think has been given sufficient attention, that is, the ‘independence’ condition for autonomy. I shall then provide reasons for proceeding with caution if we aim to show that private law gives effect to the ‘range of options’ condition for autonomy.

1. Raz’s theory of autonomy

Raz’s theory of autonomy[[4]](#footnote-4) is so well known that I need not say very much to remind us of its central features. An autonomous life is one in which the individual whose life it is has shaped that life to a significant extent, so can be considered a part-author of her life. An autonomous life depends on three essential conditions, one of the person, one of the context in which she finds herself, and one in respect of the way that person stands in relation to others. The first is the *capacity* for autonomy in a person-sensitive sense, the second *an adequate number of significant life options to choose from*, and the third, *independence*, that is freedom from coercion and manipulation by others.[[5]](#footnote-5) With those three conditions in place, a person can reasonably be asked, ‘What have you made of your life?’

This question points to an important distinction Raz makes between autonomy understood as a capacity, which relates the three conditions just mentioned, and autonomy understood as an achievement, success (to a meaningful extent) in exercising that capacity.[[6]](#footnote-6) Finally, the value of autonomy lies in the choosing of *valuable* options. ‘Autonomy is valuable only if exercised in pursuit of the good.’[[7]](#footnote-7) The absence of bad options, or indeed the state’s removing of some bad options or discouraging their pursuit, other things being equal (i.e. in doing so the state does not infringe on basic liberties), does not diminish the value of personal autonomy. This is perhaps the main idea lying behind Raz’s advance of our understanding of ‘liberal perfectionism’.[[8]](#footnote-8)

Whilst I shall be discussing the extent to which the law figures in the securing of those conditions, I think it is well to remark that Raz’s exploration of autonomy says very little about how the law, as opposed to the *state,* so figures. As far as autonomy goes, Raz’s principal concern in *The Morality of Freedom* was to establish a characterisation of freedom on the basis of which a state could legitimately adopt autonomy as one of its primary concerns, thus making legitimate its acting on that concern. Where the law *per se*, as one way in which a state acts, figured in that scheme is not something Raz specifically addressed as far as I can see. So we must speculate, or at least extrapolate.

There are a few further features of Raz’s conception of autonomy relevant to our purposes. The importance of autonomy for us does not mean that autonomy is the universal ground for achieving a flourishing life. It is important for us given the social (economic, political, technological) conditions we inhabit.

[The autonomous life] depends on the general character of one’s environment and culture. For those who live in an autonomy-supporting environment there is no choice but to be autonomous: there is no other way to prosper in such a society.[[9]](#footnote-9)

Part of what figures in understanding the value of autonomy is the fact that there are many flourishing lives that an individual can lead despite that fact that those lives will realise different, incommensurable, values.[[10]](#footnote-10) Different occupations, the pursuit of different kinds of art and science, the life of contemplation versus the life of action, are all available, and no one life can realise fully or at all many of the values available to us, but this is no tragedy. It is the human condition for us, and since each life can be a flourishing life, we have nothing to regret on that score. Finally, many of these values are dependent upon there being appropriate social conditions.[[11]](#footnote-11) Of many such values or sources of valuable available to us, like the game of tennis, or the occupation of neuroscientist, we can say they were not available to individuals in different times and places. Moreover, values are typically very much shaped in our understanding of them by the social conditions in which we seek to realise them, giving them a ‘cultural meaning’.[[12]](#footnote-12) For one of a multitude of examples,[[13]](#footnote-13) the phenomenon we call ‘marriage’[[14]](#footnote-14) is clearly related to similar phenomena in the past, though I take it as obvious that the meaning of marriage to us may be very different from its meaning for our ancestors along multiple dimensions.[[15]](#footnote-15) Finally, an autonomous person shows commitment or fidelity to the options he chooses to pursue, though the extent and nature of the required commitment will obviously vary with the nature of the option; this is part and parcel of the idea that a choice to pursue an option is only really a choice if the pursuit of it is real or genuine.[[16]](#footnote-16)

1. Relating Autonomy to Private Law – the Independence Account

The claim here is that private law has a clear function in maintaining, at least in modern societies, one of the conditions of personal autonomy, that of independence. As I hope to show, this is not a controversial claim for an autonomy theorist to make. And although, as I have mentioned, Raz has not, as far as I know, himself addressed the relationship of autonomy to private law in terms, some of what he has said seems entirely compatible with this claim.

Of course there are many different accounts of the nature of private law. I shall here simply offer my own, a ‘Kantian instrumentalist’ account, which I hope is intuitively plausible in its basic features. The ideas here are now familiar, so I can be brief.

Regarding the Kantian aspect, one might say that the basic Kantian insight is that humanity comes in units, units which we call persons. The private law takes an interest in persons in so far as they are agents, which most of us are for the greater part of our lives. Private law secures, to the extent it does, the conditions of ‘rightful’ agency: the ability to pursue purposes within the framework of interpersonal morality. It does so by ensuring the independence of our choices from the interferences of others, choices concerning the ‘means’ that we have: our bodies, our property, and our power to enter into agreements with others. So conceived, private rights are relational and negative; they concern the actions of others, prohibiting their acting so as to interfere with our means by damaging, withholding, or usurping them; you do not have any ‘positive’ rights in your means: no one else as a matter of private right is under a duty to assist you in the use of your means, or to provide a favourable environment for their use. Finally, the function of private rights is essentially allocative. In order to have a regime of right which makes necessary reference to the concept of a person’s own means, we have to know which means are yours and which are mine.

I said just above that the private law secures the conditions of rightful agency ‘to the extent it does’. I should add ‘to the extent it can’. The Kantian instrumentalist builds upon this Kantian insight into the nature of this ‘horizontal’, agent-focused, interpersonal morality, and asks, ‘When and how should the law issue directives whose aim is to help us realise this interpersonal morality?’ and the short answer is: whenever we would better comply with these moral norms when we follow the law rather than our own appraisal of what the norms in question require. This is nothing more than Raz’s dependence thesis in relation to his service conception of practical authority.[[17]](#footnote-17) But there are, of course, many complications which go to show that this simple principle is often difficult to apply in practice. The law is often clumsy, ineffective, expensive, and to the extent the law not merely guides but coerces there are always the bad effects of coercion to consider. For the instrumentalist, it is all a matter of the valid reasons for and against the law’s creating legal norms that reflect moral norms (or creating legal norms that have other functions, eg facilitating commerce) in light of the prevailing social conditions.[[18]](#footnote-18)

I now want to suggest that Raz’s own discussions of this ‘morality of right’ show that regarding the private law as primarily, at least, concerned with the independence condition of autonomy is compatible with this picture of private law.

Regarding our rational agency, Raz says:

The powers of reasoning and understanding are among our rational capacities, whereas the capacity to control our conduct enables us to express our rational capacities in action. We are responsible for our conduct because we are rational agents, and as rational agents.[[19]](#footnote-19)

More directly, private law has the same concerns as are found in Raz’s discussion of the independence condition.[[20]](#footnote-20) To take an example, private law is obviously primarily concerned with securing the absence, so far as possible, of coercion and manipulation. On this Raz says:[[21]](#footnote-21)

Coercion and manipulation draw our attention to a separate dimension of the conditions of personal autonomy: independence. It cannot be reduced to any of the others. It attests to the fact that autonomy is in part a social ideal. It designates one of the proper relations between people.

On property rights and body rights Raz writes:

Both the use-value and the exchange-value of property represent opportunities for their owner. Any harm to a person by denying him the use or value of his property is a harm to him precisely because it diminishes his opportunities. Similarly injury to the person reduces his ability to act in ways which he may desire. Needless to say a harm to a person may consist not in depriving him of options but in frustrating his pursuit of the projects and relationships he has set upon.[[22]](#footnote-22)

Turning to the facilitative side of law,[[23]](#footnote-23) the following passage reveals some of Raz’s thoughts on the law of contract:

In the case of promises the value of the power [to contract] is that it expands peoples’ abilities to fashion their lives, or aspects of their lives, by their actions. Through their promises they commit themselves to others. Up to a point, promises are analogous to decisions that constitute reasons for the deciders to perform the act they decided to perform. Both are ways of opening up options through closing other options, normatively speaking. Decisions, as well as having goals, facilitate undertaking complex activities (giving a ball, writing a symphony, etc.) that require a series of actions or concerted actions. Promises, being commitments to others, facilitate cooperation, the forging of relations that presuppose dependence, trust and joint actions, and more. For the sake of brevity I will refer to the value of having these powers as the value of enhanced control (of one’s life), though a somewhat different explanation of their value is required when the powers are held by institutions.[[24]](#footnote-24)

Moreover, the Kantian instrumentalist characterisation of private law reflects a ‘rights-based morality’ as Raz has characterized it, a ‘morality in the narrow sense’:[[25]](#footnote-25)

Morality in this narrow sense is meant to include only all those principles which restrict the individual’s pursuit of his personal goals and his advancement of self-interest. It is not ‘the art of life’, i.e. the precepts instructing people how to live and what makes for a successful, meaningful, and worthwhile life. It is clear that right-based moralities can only be moralities in this narrow sense.

I think we can rely upon a fairly intuitive and reasonably robust distinction between ‘morality’ and ‘ethics’ to help make sense of this, morality encompassing the narrow morality Raz identifies, and ethics covering ‘the art of life’. I would argue that achieving an autonomous life clearly falls within the latter.[[26]](#footnote-26) But I would make a further point. I would argue that the ethical *pre-supposes* the moral, not just in the sense that securing the moral provides for the independence condition of personal autonomy, but secures to an agent the realm of *rightful* agency which is the necessary pre-condition to any rightful pursuit of any aspect of the good life in whatever social conditions, including those in which personal autonomy is not the standard by which we assess a person’s success in life. In this sense, the ‘independence condition’ secured by private law spans both those societies in which lives are successful when autonomous, and those societies where the goodness of a life is not so measured.

To the extent that the private law is a regime of rights, that is, reflects the rights-based, narrow conception of morality, two remarks of Raz’s in his discussion of the limitations of rights-based moralities are suggestive:

This distinction between an autonomous life and a capacity for autonomy which is its precondition would not look quite the same to a supporter of a rights view of autonomy. He cannot claim that rights are justified because they protect autonomy. This would be to justify them instrumentally. He has to maintain that autonomy is constituted by rights and nothing else. The autonomous life is a life within unviolated rights. Unviolated rights create or protect opportunities. What one makes of them is left undetermined by the sheer existence of the rights. Therefore, in terms of my distinction between autonomy as a capacity and a successful use of it, the rights theorist would maintain that a capacity for autonomy guarantees that one’s life is autonomous, e.g. that no use or neglect of that capacity can make the life of those who have it more or less autonomous.[[27]](#footnote-27)

It is wrong to identify autonomy with a right against coercion, for example, and to hold that right (i.e. the right against coercion) as defeating, because of the importance of personal autonomy, all, or almost all, other considerations. Many rights contribute to making autonomy possible, but no short list of concrete rights is sufficient for this purpose. The provision of many collective goods is constitutive of the very possibility of autonomy and it cannot be relegated to a subordinate role, compared with some alleged right against coercion, in the name of autonomy.[[28]](#footnote-28)

It seems to me that these considerations show that, *prima facie* at least, private law, as understood on the Kantian instrumentalist account, serves to secure a crucial part, but only a part, of the conditions for autonomy, that is, the independence condition.

A final, important point. In implementing the (narrow) morality of right, the law cannot do so by simply reading off some set of core principles of right, such that the ethical is not brought into play. By this I mean that it is straightforwardly not true that any modern private law is simply the realisation of a private ordering determined by basic moral principles, principles that can be spelt out more or less uncontroversially, whether on a state of nature model of pre-political right or on the basis of any other heuristic. The law of trusts, the law governing insolvency, the law of succession and much more that would fall within private law conceived of as the law of the ‘horizontal’ interpersonal morality of right, of ‘private ordering’ on the facilitative side, cannot be treated as directly reflective of natural rights. This is particularly evident in, for example, the development of the law of the torts of nuisance[[29]](#footnote-29) and negligence,[[30]](#footnote-30) the development of the elements in the numerus clausas in land law,[[31]](#footnote-31) and the rationale and scope of the law of damages.[[32]](#footnote-32) It would be surprising to me, in our ‘era of personal autonomy’, if none of those ethical considerations reflected our interest in personal autonomy.[[33]](#footnote-33) But none of this detracts from the main claim of this section, that private law is a main provider of the independence condition for personal autonomy, which seems entirely correct.

1. Relating Autonomy to Private Law – Broader Accounts

By a broader account of the relation of autonomy to private law, I mean those accounts which hold that private law contributes to the realization of the other two conditions for personal autonomy, the personal capacity for autonomy and the provision of an adequate range of options. Here I must admit to a frank scepticism. Let me begin with a narrower point about the law, and then a broader point about the state.

It seems to me that lawyers and legal theorists tend to overestimate the significance of law in these matters, in particular that the law has certain creative potentials all on its own. Consider the following passage from Leslie Green:

In jurisprudence, we are used to distinguishing primary legal norms [Plan A norms] that aim to guide conduct from secondary, plan-B, norms that guide responses to conduct that fails to satisfy the primary norm. In areas like sexual interaction, however, it is not only the secondary enforcement but also the primary obligations imposed by law that should be seen as Plan B – as fallbacks, morally speaking. Things are not going well, sexually or legally, when men need guidance from the duty not to commit rape. The point is quite general. We also want people to avoid assault, to refrain from discrimination, and to deal fairly, not because of a lively awareness of the normative force of law, but because it would hardly occur to them to do otherwise. *Law* has a role to play in securing that smooth-running state of affairs, but not only by securing a duty of obedience. In some cases, *law* is at its best when it helps shape our social world in a way that is relatively invisible.[[34]](#footnote-34)

I agree whole-heartedly with the thrust of this passage, with one reservation regarding Green’s use of ‘law’ in the last two sentences. It seems to me that *the state* has a role in securing that state of affairs wherein people don’t commit crimes in the first place, by helping to secure a society wherein socialisation, culture, and education help to improve and certainly do not thwart our moral understanding, and social conditions are such that people are not systematically tempted to commit crimes. The law as such, understood in terms of statutes, cases, and the legal process may have relatively little to do in this regard. Not nothing, of course – the government can legislate for the provision of social welfare, schools and so on, but these presume a prior commitment by the state to devote its, or require others to devote their, resources to that provision.

Much nearer to the truth is that the law claims the power to *regulate* whatever society, all on its own, has created. An interesting question here is the relation of lawyers to ‘the law’ in all this. One of the themes of John Baker’s *The Law’s Two Bodies[[35]](#footnote-35)* is that most legal creativity, especially with respect to facilitative law, is due to the work of lawyers, which is then brought to the court when a dispute arises. At that point the law *per se* has a chance to register its approval or disapproval of the innovation.

It is also well to remember that even many fundamental legal concepts are not ‘legal’ concepts at source, but borrowed and modified by the law. As Raz says, ‘Negligence is not a legal concept; it is merely borrowed and used by the law.’[[36]](#footnote-36) As Gardner says, ‘[C]ontractual norms are not legal norms. They are merely legally recognised norms.’[[37]](#footnote-37) And as Baker says:[[38]](#footnote-38)

On the one hand, there are those general propositions of law, good sense, and basic morality, and those usages in relation to everyday dealings, which guide and control the conduct of lay people in their different walks of life; and on the other there is the detailed, scholarly professional learning which is not shared by the public at large. The former might be categorized as fact rather than law. Usage and custom are treated by the law as fact rather than opinion, and the general assumptions of society are facts. This is historically as well as legally sound. Judges did not invent contracts, or trusts, or bonds, or even (I suspect) contingent remainders, before they were used in real life. No more have our present generation of judges invented credit cards or electronic bills of lading.

I shall put to one side the enticing question of which parts of the judge-made law reflect more or less lay-notions of justice, and which reflect more technical legal ideas (eg contingent remainders) engineered, as it were, by practitioners and put into use long before any legal disputes brought them before a court. But surely a great deal of our legal understanding of a concept like property very much reflects the morally-charged common sense concept.[[39]](#footnote-39) We can, though perhaps vaguely and unsatisfactorily, independently specify the moral considerations that the court must answer to in rendering a sound decision. This humble truth is the foundation stone for instrumentalists about the law like the late John Gardner and myself. On this conception, morality is incurably vague and indeterminate in many cases, and one of the chief functions of the law is to resolve these uncertainties so as to resolve disputes in as fair a way as possible, as well as giving concrete directives which aim to avoid disputes in the first place. Nevertheless, as Gardner rather grandly puts it, ‘the timeless themes of private law are also the timeless themes of personal life.’[[40]](#footnote-40)

But all of this is, in a sense, by the way, because most of the sorts of meaningful options we regard as those which compose the adequate range we need to pursue an autonomous life are not created by the state, much less by the law, at all. Raz’s standard examples of meaningful options are occupations, friendships, and cultural pursuits, such as games and the arts. None of these are the creations of the law or the state. They are the creations of society. The law can and does regulate them – the law can regulate anything. And the state also has a significant role to play. Sometimes it does so directly, with targeted funding and subsidies, but generally it does so indirectly by providing for the first of Raz’s conditions, the capacity for autonomy, by providing education and healthcare.

There is, however, one thing that can be said for the law in this regard. This is the possibility that, as Gardner puts it:

the law’s recognition of and support for special relationships sometimes contributes to their availability and sustainability… , for example by helping to crystallize their constitutive norms, or to affirm their social significance, or to emphasize their solemnity.[[41]](#footnote-41)

But this must be set against the law’s ability to undermine non-legally constituted special relationships or roles, the pursuit of which counts as choosing a meaningful life option. One example is the danger Gardner identifies in what he calls ‘contractualisation’.[[42]](#footnote-42) This is the phenomenon of the law’s making special relationships or roles, such as employer-employee relationship, or the role of architect or professor or student, malleable or ‘plastic’ under the aegis of ‘freedom of contract’: terms can be agreed which very much undermine the basic sense of the special relationship or role. Anyone who has experienced the ‘managerialisation’ of the Anglo-American university in the last generation knows the consequent degradation of the roles of teacher and student only too well.

1. Dagan’s and Heller’s Choice Theory of Contracts

I shall now consider Dagan’s and Heller’s claims that a liberal law of contract has as one of its central tasks the provision of meaningful ‘options’ or ‘types’ of contract as set out in Dagan’s and Heller’s *A Choice Theory of Contract*[[43]](#footnote-43)and their subsequent paper, ‘Autonomy For Contract Refined’[[44]](#footnote-44) and Dagan’s ‘Contract’s Liberal Promise’.[[45]](#footnote-45) What I am going to suggest is that whilst this liberal theory of contract is in part *inspired* by Raz’s theory of autonomy, it is not really very closely related to it. Let me state at the outset that this is not intended as a criticism. Take inspiration wherever you can find it, I say. But I do think it is important that we, as readers of these works, do not inadvertently assume that Dagan’s and Heller’s is a development of, or application of, Raz’s own characterisation of personal autonomy.

In all of these writings Dagan and Heller use the terms ‘autonomy’, ‘self-determination’, and ‘self-authorship’ interchangeably, but the most common equation is between ‘autonomy’ and ‘self-determination’.[[46]](#footnote-46) Now authors can use terms in a stipulative fashion, but it seems to me that self-determination and autonomy, as commonly understood, mean different things, or at least have different resonances.

Autonomy, as it figures in Raz’s thinking, is, as I understand it, principally about making free choices from an adequate array of significant and valuable options. It is distinct from self-realisation, which consists in the development of all the personal capacities, eg talents, that a person has to their fullest extent.[[47]](#footnote-47) (One hopes, of course, that one’s autonomous choices match one’s talents or interests because otherwise the endeavour may end in failure, or at least not generate much meaning for the individual.) Raz also distinguishes autonomy from ‘self-creation’, which emphasises the importance of the value of making one’s own choices, choices which, though not altering the independent value of the chosen pursuits, do signify one’s commitment to those pursuits.[[48]](#footnote-48)

In *The Morality of Freedom* Raz only used the term ‘self-determination’ in respect of the right of nations to self-determine,[[49]](#footnote-49) but in so far as it is used of persons, as a general matter it seems to me to be concerned with the power to shape one’s world in many ways besides making autonomous choices, including both enhancing one’s own capacities and in the *creation* of new meaningful options and endeavours that specifically reflect one’s own capacities. It seems to reflect, in other words, something close to both self-realisation and self-creation. ‘Self-determination’ also sounds to me to be related to ‘the value of enhanced control of one’s life’ which Raz adverts to above[[50]](#footnote-50) when discussing this as a generic featureof the interpersonal moral relations that contract embodies. A life more self-determined in this sense is not a life more autonomous in Raz’s sense, except in so far as we are concerned only with the independence condition for autonomy: a highly self-determined person in the sense of self-determination I have described may be more independent in having created for herself a wider realm of freedom from the influences of others.

The last two paragraphs are offered just in order to gain a bit of focus, to better frame Dagan’s and Heller’s own characterisation of autonomy/self-determination. They write:

Self-determination represents a rich conception of freedom; its value makes our independence worthwhile: we are all entitled to be free from coercion because this freedom is necessary for each of us if we are to write by him- or herself the (separate) story of our (separate) lives.

This why liberals insist that an individual person is free not merely in the formal sense of not being subordinated to the choices of another, but also in the more robust sense of being able to make meaningful choices about how his or her life should go. Free individuals, John Rawls writes, act on their capacity ‘to have, to revise, and rationally to pursue a conception of the good’.[[51]](#footnote-51)

Dagan and Heller also emphasise the capacity to ‘re-write’ the story of one’s life:

Self-authorship, after all, stands for our rights to write and *re*-write the story of our life.[[52]](#footnote-52)

So in explaining autonomy/self-determination in this way, Dagan and Heller do not cite Raz, but Rawls. Their reliance upon Raz is found in the following passages:

The path from the political philosophy of autonomy to its working out in contract law takes a few steps. Perhaps the simplest and most direct route is by reference to work by Joseph Raz (drawn from his philosophical work, not his contract theory, which proves to be off the mark). In particular, we develop two points from Raz’s political philosophy with particular usefulness for contract theory: (1) to be free, individuals need meaningful choice and (2) states have a necessary role in supporting the availability of valuable options.[[53]](#footnote-53)

We agree with [Raz] that freedom requires individuals to be able to choose from among options they deem valuable. The idea of autonomy—that people should to some degree be the authors of their own lives—requires not only appropriate mental abilities and independence, but also “an adequate range of options.” For choice to be effective, for autonomy to be meaningful there must be (other things being equal) “more valuable options that can be chosen, and they must be significantly different,” so that choices involve “tradeoffs, which require relinquishing one good for the sake of another.”[[54]](#footnote-54)

This takes us to the choice theory of contracts: within any particular contractual sphere or context, such as sales, workplace relations, or marriage, there should be a range of valuable contract types from which prospective contracting parties can choose. And this bring us to the second Razian point Dagan and Heller pursue, the role of the state.

Raz starts by noting the diversity of valuable human goods from which autonomous people should be able to choose and the distinct constitutive value of those goods. Given that diversity, he argues, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their lives. But the state’s obligation to foster diversity and multiplicity cannot be properly accomplished through a hands-off or passive approach to the law. Why? Because such an attitude would “undermine the chances of survival of many cherished aspects of our culture.”[[55]](#footnote-55) A commitment to personal autonomy thus requires that a liberal state, through its laws, work more actively to “enable individuals to pursue valid conceptions of the good” by providing them a multiplicity of options.[[56]](#footnote-56) [[57]](#footnote-57)

Let me make a few observations about these passages and the general picture, which I hope are not captious. First of all, following on from the last section, I might repeat my scepticism about whether the various doctrines of the common law do much more than securing the independence condition for autonomy, as opposed to providing choices or options which reflect or map onto the sort of meaningful autonomous choices I think Raz is interested in. Again, my saying this is neither to critique nor endorse the choice theory of contracts, either on the basis of ‘fit’ with the current law of contract or in terms of its aspirations for reform. It is, to my mind as an instrumentalist, an open question whether the best way to proceed in contract law is to provide a range of different ‘types’ from which contracting parties may choose, or proceed by giving priority to other considerations than Dagan’s and Heller’s autonomy/self-determination. In part I find it difficult to determine from their texts whether the theory really is primarily a theory of contract *types* as opposed to an analysis and reform agenda with respect to particular contract *doctrines.* So consider this passage:

[W]here sophisticated parties to complex commercial contracts use a liquidated damages clause in anticipation of possibly unverifiable harms of breach (or for any other reason that fits their cooperative engagement), an *autonomy‐enhancing* contract law must validate its full effect.[[58]](#footnote-58)

Allowing such a doctrine would, I suppose, shape particular contracts in certain ways, but I am not sure how or whether the insertion of such a clause would make the contract of a different ‘type’ from one without the insertion. It would drain the concept of a ‘type’ of any meaning if *any* difference in the terms of two contracts made them different ‘types’. So I am not entirely clear what the individuation principles for types are.[[59]](#footnote-59)

Secondly, the ability to incorporate liquidated damages provisions in a contract is defended here on self-determination/autonomy grounds, but it looks to me much more like the non-Razian autonomy-sourced conception of self-determination as control canvassed earlier. Let me add facetiously to this thought by saying none of this seems particularly relevant to answering *the* question regarding autonomy: What have you made of your life? If someone asked me that question I would refer to my career, my relationships, my friendships, my children, perhaps to the charities I have supported, the art I have collected, or the films I helped finance. But it would be odd, or not right, to say ‘I chose to be an independent contractor rather than an employee’, or ‘I regularly included liquidated damages clauses in my contracts’, except in very special circumstances

Moving on, Dagan and Heller read Raz to say that ‘freedom requires individuals to be able to choose from among *options they deem valuable*’(my italics). Again, I am not sure that what a person ‘deems to be valuable’ has much role to play in Razian autonomy. As I understand the picture, what matters are that there are *genuinely* valuable options available, which is not a matter of choice or opinion, though as we have seen, under the rubric of ‘self-creation’ the choice to pursue a particular valuable option can express commitment to it. This gives rise to another addition to, or departure from, Razian autonomy, Dagan’s and Heller’s incorporation of Rawlsian conceptions of the good into their picture of autonomy/self-determination.

In the last but one quotation from Dagan and Heller,[[60]](#footnote-60) they do cite passages from *The Morality of Freedom* which support the state’s involvement in helping people pursue their conceptions of the good. But as I read these passages, I do not find that Raz has set out any particular theory of what a conception of the good amounts to. In these passages he is concerned to argue that the fact that individuals have different conceptions of the good, or the good life, does not mean that the state must be neutral as between them—his aim is to show that the anti-perfectonist argument for this ‘neutrality’ is a bad one. And –as always it is difficult to prove a negative—I do not see any passages in which Raz treats pursuit of one’s conception of the good as equivalent to leading an autonomous life. Of course, as we have already seen, acting autonomously is only of value when there are valuable options to pursue,[[61]](#footnote-61) but that is not the same thing as aiming to lead a life in conformity to one’s conception of the good, or the good life, whatever that precisely means.

It is well beyond the scope of this paper to pinpoint exactly what counts as a conception of the good, or the conception of a good life, whether in its Rawlsian version or otherwise, though I think it fair to say that it does have some voluntaristic element, something to do with what a person ‘deems to be valuable’. But Razian autonomy and the pursuit of a conception of the good life seem to be orthogonal to one another. I take it that both of the following are plainly true:

1. One can lead a life which conforms with one’s conception of the good, or the good life, without its being an autonomous life.
2. One can lead an autonomous life without leading a life with conforms with one’s conception of the good, or the good life.

As to (1), prior to the modern valuing of autonomy, many people surely lived lives conforming to their conception of the good life, for example those for whom the good life was framed in terms of, say, fulfilling their assigned role within a Christian community.

As to (2), many people can rightly claim to have lived an autonomous life and be perfectly capable of giving a plausible answer to the question ‘What have you made of your life?’ without in any way feeling that they were leading a life in conformity to their conception of the good life, for example segregationists in the US at the present time.[[62]](#footnote-62) Or take my own case. I think I pass the test of having achieved an autonomous life in some measure at least, but as an anarcho-socialist-anti-work ethic-anti-consumerist-environmentalist no one today leads my conception of the good life, least of all me. I try, more or less successfully, and with more or less diligence, not to thwart the principles that give shape to that conception, but there is no way I could attain it at present, for the present social circumstances simply do not permit it. It would be a job of work but I think I could present a fair argument that the only people on the planet who are living their genuine conception of the good life are some lucky amoral plutocrats.

To put the point shortly: as I understand Razian autonomy, it is principally about the choices one has oneself made, whereas conceptions of the good life, and whether they are realised, is inherently about the social circumstances one inhabits, circumstances which are never a matter of the choice of any individual, but concern collective action.

Two further points for clarification. None of what I have written turns on the dispute between Dagan and Heller and their critics about what ‘counts’ as part of the law of contract, say, whether it is the common law or includes things like minimum wage legislation. To my mind there is a principled answer to this – roughly whether the legislature perceives, when it acts, that the common law has failed to address, or because of the features of its law-creating powers, is incapable of addressing, its own inadaquacies in giving effect to the rules of rightful agency, or whether the legislature is aiming to do something else (inhibit or promote some activity for other reasons, eg dealing with climate change). But this is orthogonal to the matter under discussion.

Second, Gardner and others reject ‘liberal’ accounts of private law for being ahistorical.[[63]](#footnote-63) The central doctrines of the common law and equity were settled long before liberalism showed up, and this applies even more so, obviously, to Raz’s specific version of liberalism, or Dagan’s and Heller’s. But here, I think, Dagan and Heller do have a leg to stand on, and a Razian leg to boot. Consider again the case of marriage which Raz discusses and we looked at above. Many of its forms have remained whilst its meaning has changed considerably over time, which also altered the way in which it was justified and was justifiable to contemporaries. I am doubtful that a case that the common law is very different could be made.

1. Conclusion

I have explored what I understand to be Raz’s conception of autonomy, and raised doubts about its relevance to private law outside its contribution to the independence condition. Dagan’s and Heller’s work provided something of a testing ground for that claim. In conclusion I offer a few general thoughts about autonomy and private law, ones which perhaps stray from any particular conception of autonomy, in particular Raz’s.

First, one of the things that any autonomy theorist has to deal with is the issue of the rights of legal persons, principally companies, who figure so prominently in private law litigation from the late nineteenth century onwards. A legal person has no life, so no autonomous life, so has no autonomy interests. Now I suppose that there is some theory which links the rights of legal persons to natural persons so that enforcing the former’s private law rights indirectly enhances the latter’s interests in personal autonomy, but that needs to be spelled out.

Second, one of the problems of judging the law from the perspective of autonomy is that the independence condition may in some respects overlap with the capacity condition. Consider the following from my own work,[[64]](#footnote-64) in which I myself spoke of autonomy: does the discretionary beneficiary of a massively discretionary trust[[65]](#footnote-65) suffer a diminution of his autonomy under this arrangement? I put the point in two ways – one, because property can be applied to his benefit without his acquiring title – say being licensed to reside in a property owned by the trust, and having a private company (owned by the trust) issue him a credit card whose bills are paid out of trusts funds, he is in a sense rich without being rich in a sense that his creditors could take advantage of his *de facto* wealth; in one sense this makes him ‘legally irresponsible’. Is that a diminution of his autonomy, as someone who is ‘kept’? In another way the beneficiary, to the extent he has some entitlement to the trust funds, but only at the radical discretion of the trustee, could be said to have had his autonomy in the sense of the independence condition diminished because he is subject to the other in respect of *his* means. But one could also say this diminishes his *capacity* for autonomy because he is being treated like an infant.

Finally, there is the ‘just so story’ problem, i.e the problem that a claim that a particular doctrine of the law is explained in terms of autonomy is unfalsifiable by any agreed criteria. The worry is that one could concoct an ‘autonomy’ story about any bit of private law doctrine and its opposite because the concept of autonomy is so malleable or protean in its applicability.[[66]](#footnote-66) Here is an example of what I mean: One could say that the doctrine of consideration supports autonomy because it ensures that only bargains are enforced and this protects people from the prospect of the rampant legalisation of mere promising, which would reduce their autonomy. But one could also argue that the doctrine of consideration thwarts autonomy by refusing the help of the law to those people who really intend their mere promises to be binding, removing the legal facility for so doing, which diminishes their autonomy, and we know this because the law of covenants supplements contract law with just this mechanism, so long as the promisor is willing to attend to the required formality. (This way of putting it is crassly ahistorical, I know—the law of covenants came first.) Another concern here is that private law is generally considered ‘zero-sum’ in the sense that a gain in the rights of those in one class of persons reduces the freedom of those in the correlative duty owing class; the issue is particularly stark when the class of right holders is essentially the same as the class of duty owers. With respect to which transfers, for example, should the principle of *nemo dat quod non habet* apply rather than a bona fide purchaser rule? How should one assess

whether and how such a choice contributes to autonomy? In at least some cases, perhaps it would be right to hold that the value of autonomy is powerless to determine or justify at least some private law doctrines.

References

(Dagan and Heller 2017) (Dagan and Heller 2021) (Ripstein 2021) (Stevens 2020) (Raz 1986, Raz 1994) (Raz 2003) (Raz 2014) (Penner 2020) (Penner 2018) (Penner 2020) (Penner 2020, Penner 2020) (Raz 2010) (Green 2018) (Baker 2001) (Penner 2011) (Gardner 2014) (Penner 2021) (Gardner 2018) (Rawls 2001) (Smith 2017, Penner forthcoming 2021) (Dagan 2021) (Dagan Forthcoming)

Baker, J. H. (2001). The Law’s Two Bodies. Oxford, Oxford University Press.

Dagan, H. (2021). A Liberal Theory of Property. Cambridge, Cambridge University Press.

Dagan, H. (Forthcoming). The Liberal Promise of Contract. Private Law and Practical Reason: Essays on John Gardner’s Private Law Theory. H. Psarras and S. Steel.

Dagan, H. and M. Heller (2017). The Choice Theory of Contracts. Cambridge, Cambridge University Press.

Dagan, H. and M. Heller (2021). "Autonomy for Contract, Refined." Law and Philosophy.

Gardner, J. (2014). What is Tort Law For? Part 2. The Place of Distributive Justice. Philosophical Foundations of the Law of Torts. J. Oberdiek. Oxford, Oxford University Press**:** 335-353.

Gardner, J. (2018). From Personal Life to Private Law. Oxford, Oxford University Press.

Green, L. (2018). Escapable Law: Gardner on Law and Morality. Oxford Legal Research Paper Series 1 Paper No 18**:** 1-24.

Penner, J. (2020). Justifying Private Law: ‘Reasons Fundamentalist’ Instrumentalism and the Kantian Account. Justifying Private Rights. S. Degeling, M. J. Crawford and N. A. Tiverios. Oxford, Hart**:** 45-62.

Penner, J. (2021). Justifying Private Law: “Reasons Fundamentalist” Instrumentalism and the Kantian Account. Justifying Private Rights. S. Degeling, M. Crawford and N. Tiverios. Oxford, Hart**:** 45-62.

Penner, J. (forthcoming 2021). "Justifying the Office of Trusteeship With Particular Reference to Massively Discretionary Trusts." Canadian Journal of Law and Jurisprudence.

Penner, J. E. (2011). "Potentiality, Actuality, and "Stick"-Theory." Econ Journal Watch **8**: 274-278.

Penner, J. E. (2018). Private Law, *Potentia* and the Ethical: On What Justification Does the State Coercively Tax its Subjects in Order to Build Bridges, Fund the BBC, and Subsidise Charities? Questioning the Foundations of Public Law. M. Dowdle and M. Wilikinson. Oxford, Hart**:** 99-113.

Penner, J. E. (2020). Don’t Crash into Mick Jagger when He is Driving his Rolls Royce: Liability in Damages for Economic Loss Consequent upon a Personal Injury. Civil Wrongs and Justice in Private Law. P. B. Miller and J. Oberdiek. Oxford, Oxford University Press**:** 253-271.

Penner, J. E. (2020). Property Rights: A Re-Examination. Oxford, Oxford University Press.

Rawls, J. (2001). Justice as Fairness: A Restatement. Cambridge MA, Harvard University Press.

Raz, J. (1986). The Morality of Freedom. Oxford, Clarendon Press.

Raz, J. (1994). Ethics in the Public Domain. Oxford, Clarendon Press.

Raz, J. (2003). The Practice of Value. Oxford, Clarendon Press.

Raz, J. (2010). "Responsibility and the Negligence Standard." Oxford Journal of Legal Studies **30**(1): 1-18.

Raz, J. (2014). Is There a Reason to Keep a Promise? Philosophical Foundations of Contract Law. G. Klass, G. Letsas and P. Saprai. Oxford, Oxford University Press**:** 58-77.

Ripstein, A. (2021). "The Contract Theory of Choices." Law and Philosophy.

Smith, L. (2017). "Massively Discretionary Trusts." Current Legal Problems **70**: 17-54.

Stevens, R. (2020). Contract, Rights and the Morality of Promising.

1. \* Kwa Geok Choo Professor of Property Law, National University of Singapore. Many thanks to Ding Chunyan, Patrick Emerton, Duncan Horne, Rebecca Lee, Nicholas Liu, Jan Mihal, Alvin See, Stephen Smith, Masayuki Tamaruya, Ying Hu, Yip Man, Quinshe Yao for helpful comments and discussion. [↑](#footnote-ref-1)
2. Many not yet published. I shall not list them here. [↑](#footnote-ref-2)
3. Dagan & Heller 2017; Dagan 2021 (Property). For recent discussion of the former see Ripstein 2021, Stevens 2020, Dagan & Heller 2021. [↑](#footnote-ref-3)
4. The original and most thorough treatment is Raz 1986, in particular chs 14 and 15. I have scoured all of Raz’s other publications that I have and as far as I can tell there are no later sustained treatments of autonomy, though Raz revisits some of the important themes in Raz 1994, 102-109, and Raz 2003. [↑](#footnote-ref-4)
5. Raz 1986, 372-373. [↑](#footnote-ref-5)
6. Raz 1986, 204. [↑](#footnote-ref-6)
7. Raz 1986, 381. [↑](#footnote-ref-7)
8. Raz 1986, chapter 15. See also Raz 1994, Chapter 4. [↑](#footnote-ref-8)
9. Raz 1986, 391. [↑](#footnote-ref-9)
10. Raz 395-399. [↑](#footnote-ref-10)
11. Raz 1986, 205-207, 369-370 [↑](#footnote-ref-11)
12. Raz cite. [↑](#footnote-ref-12)
13. Raz 1986, 392-393. [↑](#footnote-ref-13)
14. Discussed at Raz 1986, 392-393. [↑](#footnote-ref-14)
15. There are different options in making sense of this; one might say our ‘concept’ of marriage has changed, though it is obviously related to the concept of marriage from past times, or alternatively that we retain the same concept but have formed new beliefs and rejected some old ones about the phenomenon the concept represents, or that we have come to have learned about the phenomenon such that we have come to a truer understanding of marriage than did our forebears. Here is not the place to get into this, though for what it is worth I would reject the last option. [↑](#footnote-ref-15)
16. Raz 1986, 383-390. All of the issues raised in this paragraph are explored in illuminating detail in Raz 2003. [↑](#footnote-ref-16)
17. Raz 1986, 42-53. [↑](#footnote-ref-17)
18. The preceding two paragraphs draw upon Penner 2020 (‘Justifying’) and Penner 2020 (PRAR), chapter 8. [↑](#footnote-ref-18)
19. Raz 2010, 4. [↑](#footnote-ref-19)
20. Raz 1986, 377-378. [↑](#footnote-ref-20)
21. Raz 1986, 378. [↑](#footnote-ref-21)
22. Raz 1986, 413. [↑](#footnote-ref-22)
23. The facilitative side of private law comprises much more than contract – agency, bailment, trusts, and so on, which may involve contracts but needn’t – but as far as I know Raz doesn’t discuss any of these. [↑](#footnote-ref-23)
24. Raz 2014, 61; see also ibid at 67 and Raz 1994, 38. [↑](#footnote-ref-24)
25. Raz 1986, 213. [↑](#footnote-ref-25)
26. For Raz’s own discussion of a broad notion of morality which clearly encompasses both ‘morality’ and ‘ethics’ as I have called them, see Raz 1986, 214-216. See also Raz 2003, 34-35, 152-153, where Raz seems to treat ‘moral’ values in the narrow sense, distinguishing them from values which are not subject to the ‘special social dependence thesis’, viz the thesis that ‘some values exist only if there are (or were) social practices sustaining them’. Ibid, at 19. [↑](#footnote-ref-26)
27. Raz 1986, 204-205. [↑](#footnote-ref-27)
28. Raz 1986, 207. [↑](#footnote-ref-28)
29. Penner 2020 (PRAR), 143-155. [↑](#footnote-ref-29)
30. Penner 2021, 59-60. [↑](#footnote-ref-30)
31. Penner, 2020 (PRAR), 12-18. [↑](#footnote-ref-31)
32. See, eg, Penner 2020 (Mick Jagger). [↑](#footnote-ref-32)
33. For similar ruminations see Penner 2018, 106-107. [↑](#footnote-ref-33)
34. Green 2019, 21-22, footnotes omitted, my italics. [↑](#footnote-ref-34)
35. Baker 2001. [↑](#footnote-ref-35)
36. Raz 2010, 5. [↑](#footnote-ref-36)
37. Gardner 2018 (Labour), 36. [↑](#footnote-ref-37)
38. Baker 2001, 59. [↑](#footnote-ref-38)
39. I have elsewhere tried to show that the layman’s concept of property has ill-deserved the abuse it has received at the hands of some legal scholars. See Penner (2020) (PRAR), 39-40; Penner 2011, 275. [↑](#footnote-ref-39)
40. Gardner 2018, 5. [↑](#footnote-ref-40)
41. Garder 2018, 46. [↑](#footnote-ref-41)
42. Gardner 2018 (FPLPL), 44-46; Gardner 2018 (Labour). [↑](#footnote-ref-42)
43. Dagan & Heller 2017. [↑](#footnote-ref-43)
44. Dagan & Heller 2021. [↑](#footnote-ref-44)
45. Dagan forthcoming. [↑](#footnote-ref-45)
46. See, eg, Dagan & Heller 2017, 1, 2, 16, 35, 41, 43; Dagan & Heller 2020, 3, 11, 18, 22; Dagan forthcoming, 18, 19, 20, 22 [↑](#footnote-ref-46)
47. Raz 1986, 375-376. [↑](#footnote-ref-47)
48. Raz 1986, 387-390. [↑](#footnote-ref-48)
49. Raz 1986, 207-209. [↑](#footnote-ref-49)
50. N 23 supra. [↑](#footnote-ref-50)
51. Dagan & Heller 2017, 42, citing Rawls 2001, 19; See also Dagan & Heller 2021, 22. [↑](#footnote-ref-51)
52. Dagan & Heller 2021, 11, emphasis original. [↑](#footnote-ref-52)
53. Dagan & Heller 2017, 68. [↑](#footnote-ref-53)
54. Ibid, 69. [↑](#footnote-ref-54)
55. Citing Raz 1986, 162. [↑](#footnote-ref-55)
56. Citing Raz 1986, 133, 265. [↑](#footnote-ref-56)
57. Dagan & Heller 2017, 72. [↑](#footnote-ref-57)
58. Dagan 2021, 21, my italics. See also the extensive consideration of particular contract doctrines in Heller & Dagan 2020. [↑](#footnote-ref-58)
59. It may be that with respect to questions of doctrine, in particular doctrines which span contract types, like the basic principle of ‘voluntariness’ that Dagan and Heller identify (Dagan & Heller 2017, 82-83), ‘choice theory’ is an independent critique of transfer theory, which requires accounting for non-type specific contractual doctrines, for example Dagan’s and Heller’s claim that specific performance is an exceptional remedy; see Dagan and Heller 2021, 10-12. Even so, besides setting out broad categories of contractual spheres or contexts (Dagan & Heller 2017, ch 9) within which any contract would be a type within that sphere, I have not been able to find any clear criteria which distinguish one type within that sphere from another. Dagan and Heller do provide us with *examples* of distinct types within a sphere, which I assume we are intuitively to understand to be different types, as with, for example the employer-employee contract type and the independent contractor type within the sphere of work relations (Id, 70-71). [↑](#footnote-ref-59)
60. N 56 supra. [↑](#footnote-ref-60)
61. N 6, supra. [↑](#footnote-ref-61)
62. I am not, of course, denying that *de facto* segregation, as in schooling and housing, does not persist in the US, nor denying that there remains some *de jure* segregation (on which I am not competent to comment) –the point is that this remaining segregation, however extensive, is not what the segregationist is after, except *faut de mieux*. [↑](#footnote-ref-62)
63. See, eg, Gardner 2018, 183-184, 195-196, 199. [↑](#footnote-ref-63)
64. Penner, forthcoming 2021. [↑](#footnote-ref-64)
65. Lionel Smith coined the term; see Smith 2017. [↑](#footnote-ref-65)
66. A claim of this kind with respect to Dagan & Heller 2017 was made by Ripstein 2020, 19-26; for their reply see Dagan & Heller 2020, 20-24, and see also 5-7. I shall not adjudicate this dispute here. [↑](#footnote-ref-66)