CONTRACT LAW'S MORALITY AND PUNITIVE DEBT ENFORCEMENT

Mark P. Gergen

ABSTRACT

This article addresses the morality of contract law and its implications for punitive debt enforcement. Contemporary moral theories of contract offer different accounts of what is or could be the morality of contract law. Charles Fried and Peter Benson argue contract law appropriately embodies the morality of commercial exchange. On this view, people owe nothing to others, and people may use a contract to exploit an advantage they have over others, so long minimal requirements are met (e.g., people know what they are getting and/or there is a well-functioning market). This allows creditors to demand and enforce as harsh terms as debtors will agree to or as the market allows and treats debtor protection laws (like bankruptcy law) as problematic social interventions in the natural order of contract law and the marketplace.

Critical and reconstructive contract theories do better. Seana Shiffrin's warning contract law and the morality it embodies could weaken norms of interpersonal morality is spot on with respect to punitive debt enforcement. In most societies a creditor is expected to be lenient when a debtor is unable to pay for reasons beyond their control. Debtor protection laws can be strengthened by being linked to this norm of leniency, and to a broader norm Shiffrin identifies requiring a creditor to treat a debtor reasonably by virtue of their power over a debtor.

Liberal contract theory does even better. From a regulatory perspective, liberal contract demands lawmakers do an autonomy accounting in deciding how to regulate punitive debt enforcement. I show this justifies putting a thumb on the scale of economic analysis in favor of reducing pain suffered by debtors who default or who pay in distress, with the thumb's weight depending on whether inflicting pain increases access to credit or to reduces the cost of credit because of the different stakes for people's autonomy.

Liberal contract theory also seeks to replace the morality of commercial exchange with a norm demanding people treat each other as substantive equals in contractual interactions. This norm (aka relational justice) would have profound implications for punitive debt enforcement. The required changes are so great that it casts doubt on whether this is a cognizable legal norm in this area of law currently.

But this is not a reason to dismiss the norm of relational justice as a pipe dream. The morality of contract law is to, some extent, a social construct, like contract law itself. If contract law can be reconstructed along genuinely liberal lines, then at some time in the future there will be a robust set of rules tempering the power of creditors to punish people who default that will be understood as aspects of a general requirement that people treat each other as substantive equals in contractual interactions. Broadening contract theory to include debtor protection laws and linking the leniency norm to the norm of relational justice, are small steps in this direction.

CONTRACT LAW'S MORALITY AND PUNITIVE DEBT ENFORCEMENT

Mark P. Gergen

TABLE OF CONTENTS

CONTRACT LAW'S MORALITY AND PUNITIVE DEBT ENFORCEMENT

Mark P. Gergen*

1) INTRODUCTION

A striking characteristic of personal debt is that a creditor is allowed to punish a debtor who defaults. Creditors must have this power to deter people from borrowing when they do not expect to be able to repay, and to coerce people to repay when this involves significant personal sacrifice. People who need credit want creditors to have this power because decreasing the default rate reduces the cost and increases the availability of credit. But people who fall on hard times, and cannot repay a debt, depend upon a creditor's leniency so they are not punished unnecessarily.

Inevitably the law regulates debt enforcement. Sometimes the law steps in to address a collective action problem when creditors compete to grab whatever a debtor can pay.[1] I put this problem to the side for reasons that will become clear. This article addresses how the law constrains creditors from punishing people who default.[2] Lawmakers must determine what punishment a creditor may inflict on a defaulter; how much discretion a creditor should have in deciding when to punish a defaulter; and to what extent the answers to these two questions should be left to private ordering. Economics has a great deal to say

* Professor, University of California Berkeley Law School.

[1] This was a principal purpose of the first bankruptcy law. Emily Kadens, *The Last Bankrupt Hanged*, 59 DUKE L.J. 1229 (2010).

[2] Issues associated with creditors lending to debtors who are unlikely to be able to repay are outside this article's scope. I. Ramsay and T. Williams, *Peering Forward, 10 Years After: International Policy and Consumer Credit Regulation*, 43 JOURNAL OF CONSUMER POLICY 209, 213 (2019), observes the crash of 2007 called into question the assumption "Lenders do not lend to those who cannot repay." One problem is lenders seeking to profit from interest and penalties incurred by debtors who are expected to default but to struggle to pay their loan balance plus additional charges incurred on default. See Ronald Mann, *Bankruptcy Reform and the "Sweat-Box" of Credit-Card Debt*, 2007 U. ILL. L. REV. 375. This practice is like a hidden pricing scheme. Another problem is the securitization of debt may encourage debt-originators to under-screen for default risk because they expect to be able to resell debt to purchasers who do not adequately discount for default risk. These problems may require regulating lending at the front end, such as by requiring lenders to engage in suitability analysis.

about the answers to these questions as a regulatory matter,[3] but I will put the regulatory perspective and economics to the side initially to focus on the questions of what the morality of contract law is and what are the implications of contract law's morality for punitive enforcement of debt. By the morality of contract law, I mean how contract law instructs people they may appropriately treat others in the making, performance, and enforcement of contracts.

Contemporary moral theories of contract law offer different accounts of what is or at least could be the morality of contract law. Charles Fried and Peter Benson argue contract law embodies what I will call the morality of commercial exchange (other names are possible, like the morality of the marketplace or the morality of money).[4] By this way of thinking, people owe nothing to others, and may use a contract to exploit an advantage they have over others, so long as minimal requirements are met (e.g., the other party knows what they are getting into and/or there is a reasonably well-functioning market). The morality of commercial exchange allows creditors to bargain for and to enforce as harsh enforcement terms as debtors will consent to or the market allows.

Liam Murphy suggests people came to treat the morality of commercial exchange as the natural order of human interaction because we live much of our lives in the marketplace.[5] Fried and Benson endorse this morality, and ground contract law on the values of formal equality and formal autonomy, partly because of what they set out to do, which is to explain and to justify contract law as the field is traditionally defined. The traditional definition of the field treats a commercial agreement as the prototypical type of contract,[6] and assumes rules that were developed to deal with commercial agreements

[3] Michelle J. White, *Bankruptcy Law*, in Polinsky & Shavell, eds., HANDBOOK OF LAW AND ECONOMICS, Vol. 2, surveys the economic literature. This paper addresses economic analysis of the enforcement of personal debt in Section 5(a), which considers how accounting for debtors' autonomy interests alters economic analysis.

[4] CHARLES FRIED, CONTRACT AS PROMISE (Harvard 1981); PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW (Harvard 2019).

[5] Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORONTO L.J. 453 (2020).

[6] Karl N. Llewellyn, *What Price Contract?-An Essay in Perspective*, 40 YALE L.J. 704, 705 (1931).

apply to every type of human interaction that is treated as contractual.[7] This prototype and these rules bring with them the morality of commercial exchange. This is how we expect agents to interact when contracting, performing contracts, and enforcing contracts on behalf of companies. This is also how we expect people to interact in some types of market transactions.

But people are not always expected to interact this way. An unfortunate consequence of defining contract law's morality as the morality of commercial exchange is that the "contractualization" of a relationship strips the relationship of moral dimensions that are absent in a mere "this-for-that" exchange transaction.[8] Another unfortunate consequence is that other bodies of law like bankruptcy law, which do what contract law cannot (again as the field is conventionally defined), come to be seen as problematic social interventions in the natural order of the marketplace and contract law.[9]

Seana Shiffrin flags a related worry that is spot on with respect to punitive debt enforcement.[10] It would be unfortunate (indeed it would be tragic, given the implications for people's lives) if the morality of commercial exchange came to dominate how people think about punitive debt enforcement, displacing an old norm that required creditors to treat defaulters leniently when punishment was not warranted. This leniency norm is a familiar aspect of a broader interpersonal moral norm Shiffrin identifies. The broader norm requires a creditor to treat a debtor reasonably in administering and enforcing a debt by

[7] HANOCH DAGAN & MICHAEL HELLER, THE CHOICE THEORY OF CONTRACTS (Cambridge 2017), at 136 (criticizing "the universalizing tendency advocated by the Willistonian project"); Lon L. Fuller & William Purdue, *The Reliance Interest in Contract Law*, 36 YALE L. J. 52, 69, 89 (1936)(criticizing Williston for applying remedies designed for commercial agreements to other types of contracts).

[8] John Gardner, *The Contractualization of Labor Law*, in Collins, et. al. eds, PHILOSOPHICAL FOUNDATIONS OF LABOR LAW (Oxford 2018), 41.

[9] FRIED, supra n. 4, at 108. Cf. Murphy, supra n. 5, at 480 (saying of bankruptcy laws, "the legal norms are clearly all instruments of general social values; there are neither real nor conventional moral norms that they could mirror in any way").

[10] Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708 (2007); Seana Shiffrin, *Hidden Delegations: The Assignment of Contractual Rights and Consumer Debt*, 86 MODERN L. REV. 1 (2023).

virtue of a creditor being in a position of power over a debtor.[11] I will argue debtor protection laws can and should be strengthened by being linked to these norms.

Liberal contract theory reconstructs contract law in several respects.[12] It expands the field to cover all rules that facilitate people's cooperative ventures by providing state backing; it defines the subjects of contract law as real people and not artificial persons; and it grounds contract law on the values of substantive equality and substantive autonomy. Punitive debt enforcement is a natural subject for liberal contract theory because enforcement has debilitating effects on people who default or who pay in distress, while people without wealth need access to affordable credit to thrive. This is particularly true in societies that combine great wealth and a limited public sector because people without wealth need to borrow against their potential earning capacity to obtain expensive necessities (housing, health care, education, etc . . .) the state does not provide. From a regulatory perspective, liberal contract demands lawmakers do an autonomy accounting in deciding how to regulate punitive debt enforcement. I show this justifies putting a thumb on the scale of economic analysis in favor of reducing pain suffered by debtors who default or who pay in distress, with the thumb's weight depending on whether inflicting pain increases access to credit or reduces the cost of credit because of the different stakes for people's autonomy.

Liberal contract theory also seeks to replace the morality of commercial exchange with a norm demanding creditors treat individual debtors as substantive equals. This norm (aka the requirement of relational justice) would have profound implications for punitive debt enforcement. Sadly, the required changes are so great that it casts doubt on whether relational justice is a cognizable legal norm in this area of law currently. But this is not a reason to dismiss the norm of relational justice as a pipe dream. The morality of contract

---

[11] Shiffrin, *Hidden Delegations*, n. 10, at 15-16.

[12] DAGAN & HELLER; *supra* n. 7; HANOCH DAGAN & AVIHAY DORFMAN, RELATIONAL JUSTICE: A THEORY OF PRIVATE LAW (Oxford 2024); Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY 89 (2022); Hanoch Dagan & Avihay Dorfman, *Poverty and Private Law*, 68 AMER. J. JURIS. 229 (2023); Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, 71 U. TORONTO L.J. 207 (2021); Hanoch Dagan & Mark P. Gergen, *Autonomy and Form* (unpublished manuscript); Hanoch Dagan & Mark P. Gergen, *Autonomy, Implication, and Interpretation* (unpublished manuscript).

law is to, some extent, a social construct, like contract law itself. If contract law can be reconstructed along genuinely liberal lines, then at some time in the future there will be a robust set of rules tempering the power of creditors to punish people who default that are understood as aspects of a general requirement that people treat each other as substantive equals even in contractual interactions. Broadening contract theory to include debtor protection law and linking the leniency norm to the norm of relational justice, are small steps in this direction.

2) Personal Debt's Landscape

This section begins by explaining what I mean when I say personal debt is punitively enforced. It then sketches the past and present landscape of personal debt to provide factual background for what follows.

a. Enforcement often is punitive.

People often resist the claim that the enforcement of personal debt is punitive by pointing out that in the modern world (i.e., after debtors' prisons were abolished), when a creditor enforces a debt, they merely take (or take back) what they are entitled to take. This is beside the point because I define an act done to enforce a debt as punitive when the harm an act inflicts on a debtor greatly exceeds the immediate benefit of an act to a creditor (generally the immediate benefit is payment of a debt).[13] This definition excludes benefits

---

[13] Punitive enforcement of debt inflicts both a private harm and a social harm when a defaulter is punished (of course, the hope is the threat will be effective so punishment will rarely be needed). Non-punitive enforcement also inflicts a private harm and a net social harm when the harm enforcement inflicts on a debtor (and third parties) exceeds the immediate benefit to a creditor. This is commonplace in foreclosure, eviction, and asset seizure because of the debilitating effect to a debtor of being deprived of a basic asset. The benefit to the creditor is the asset's market value minus collection costs. The value obtained by the creditor makes asset seizure less punitive, but it also makes the threat of seizure more credible by reducing the cost to a creditor of inflicting pain on a debtor.

My definition of punitive compares the harm an act done to enforce a debt imposes on a defaulter to the immediate benefit to a creditor. Typically, a remedy is described as punitive when the remedy gives the injured party a windfall (i.e., more money than is necessary to fully compensate the injured party for their injury). Punitive damages are punitive in this sense. So is a creditor taking property securing a debt on default when the value of the property significantly exceeds the amount of a debt. Courts have long taken a proactive role in protecting debtors from remedies that are punitive in this other sense. Early on courts of equity intervened to protect a mortgagor's equity. Later courts of equity intervened to prevent enforcement of penal bonds. This was long before debtors' prisons were abolished. A cynic could say courts of equity were more of backing up a threat. Imprisonment clearly is punitive under this definition because imprisonment harms a debtor and is of no immediate benefit to a creditor (apart from backing up a threat). For the same reasons it is punitive for a creditor to use an electronic switch to render a debtor's car or other asset useless.[14] This is so even if the creditor is disabling an asset it sold to the debtor.

A small immediate benefit to a creditor from enforcing a debt does not make enforcement nonpunitive when the harm to a debtor is much greater. The value of prison labor realized by the penal system does not make prison nonpunitive. It is punitive for a creditor to seize an asset when the asset is worth much more to the debtor than the asset's resale value in the creditor's hand minus collection costs. So too is garnishing a debtor's wages when the cost to a creditor of obtaining garnishment is a large fraction of the funds recovered.

In *Williams v. Walker-Thomas Furniture Co.*,[15] Walker-Thomas was punishing Williams for not paying her debt when the bailiff seized her stereo, bed, chest, and washing machine. The bailiff valued these items at $75, $7.50, $9, and $0 respectively.[16] The pain inflicted on Ms. Williams, including the feeling of being violated and humiliated when the bailiff demanded entry into her home in front of her children and neighbors to seize the items, greatly exceeded the resale value of the items to Walker-Thomas. The resale value probably did not cover the bailiff's fee, which was added to Williams' debt.

In all these cases, a creditor's threat to do the act is coercive. In the parlance of economics, a creditor makes the threat for reasons of deterrence to deal with problems of adverse selection (debtors incurring debts they do not expect to repay) and shirking (debtors not repaying what they can). When a creditor carries out the threat their major

---

inclined to protect a debtor's wealth than his liberty. I expect what bothered judges was the windfall to a creditor.

[14] Section 5(a) uses "electronic collateral" to illustrate what autonomy-accounting adds to economic analysis.

[15] 350 F.2d 445 (D.C. Cir. 1965).

[16] Duncan Kennedy, *The Bitter Ironies of Williams v. Walker-Thomas Furniture Co. in the First Year Law School Curriculum*, 71 BUFF. L. REV. 225 (2023). When I presented this paper in Canada, a commercial lawyer from Toronto commented that a major store chain used to make a practice of seizing assets on Saturdays so a debtor's neighbors would be home to see.

purpose (and their only purpose when a creditor derives no immediate benefit from the act) is to punish a debtor for shirking or dishonesty and as an example to others.

Not all debt enforcement is punitive (though, for middle- and low-income debtors almost all debt enforcement techniques are painful, and many are debilitating). Modern debt collection techniques that involve harassing debtors are a border-line case. Harassment inflicts pain on debtors (and is designed to do so) but these techniques are intended to yield an immediate benefit to the creditor in payment of a debt. Reporting default is an ambiguous case. Reporting default is not punitive if a report is part of an information sharing arrangement among creditors to better evaluate a potential borrower's creditworthiness. Publicizing default is punitive if the purpose is to embarrass a defaulter. We should not shy from using the term punitive to describe debt enforcement techniques that clearly are punitive because some enforcement techniques are borderline or ambiguous.

People who fail to pay their debts are rarely imprisoned today. Instead, people lose their home, their car, and a substantial fraction of their wages. But such losses may be as painful as debtors' prison was when defaulting debtors were routinely imprisoned. Back then a prison was thought of as a place of confinement and not as a place for further types of punishment. Prisoners were not excluded from the community. They could be joined by their families, receive visitors, engage in business, and receive charity. Well-to-do prisoners could pay for decent accommodations and, in large prisons, had amenities like recreational facilities and taverns.[17] People feared debtors' prisons. But it is not clear the threat of imprisonment on these terms was worse than the threat today of losing a home, a car, or a substantial fraction of one's wages. The harm inflicted on an individual by loss of a home, a car, or a substantial fraction of their wages is not just material deprivation. There

[17] MARGARET FINN, THE CHARACTER OF CREDIT (Cambridge, 2003), at 130-151. Debtor's prisons had their own debt economy. A well-to-do prisoner who failed to pay his debts was punished by being excluded from the accommodations, food, and community shared by well-to-do prisoners and consigned to live with poor debtors.

is harm in social exclusion when a deprivation prevents a debtor from interacting on "creditable" terms with other people.[18]

The pain inflicted by punitive debt enforcement is not just the pain inflicted on debtors in default who lose their home, their car, or a substantial fraction of their wages. Pain is also inflicted on debtors in distress who sacrifice to pay a debt to avoid the painful consequences of default. The pain of such sacrifices is well-captured by the adage "The rent eats first." People will go without food and medical treatment to pay rent and utilities. When people make such sacrifices to pay rent or a mortgage the immediate harm to them from the sacrifice significantly exceeds the immediate benefit to a landlord or a creditor of being paid.

To be clear, the punitive character of much personal debt enforcement does not make it wrong. Creditors must be able to punish debtors who default to deter adverse selection and shirking. What is problematic both as a regulatory matter and morally is when a creditor punishes a debtor who defaults though punishment is not warranted because a debtor is unable to pay for reasons beyond their control.

b. Personal debt in early commercial England.

Enforcement of personal debt has always been mechanical and punitive. These characteristics appear starkly in early commercial England (circa 1550 to 1700), so I start there. Personal credit and debt were the lifeblood of commerce then because there was no paper currency and coin was rare.[19] One consequence is there was an enormous amount of

[18] Dagan & Dorfman, *Poverty, supra* n. 11, at 236-238, makes this point channeling Adam Smith. According to Smith, poverty is relative and exists when an individual is unable to engage in "creditable" terms in ordinary public and private interactions. ADAM SMITH, INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Bk. 5, Ch. II, Part II, Art. IV (2017), 522.

[19] CRAIG MULDREW, THE ECONOMY OF OBLIGATION: THE CULTURE OF CREDIT AND SOCIAL RELATIONS IN EARLY MODERN ENGLAND (St. Martin's Press 1998), estimates that in England during this period "money formed less than 7 per cent of exchanges, and almost certainly formed less than 10 per cent." Id, at 100. ELIZABETH HARDWICK, FAMILY BUSINESS: LITIGATION AND THE POLITICAL ECONOMIES OF LIFE IN EARLY MODERN FRANCE (Oxford 2009), finds a similar pattern of credit in a French town during this period. One difference is that bankruptcy was criminalized earlier in France than in England, and prosecutions seem to have been more common in France. The offense covered hiding assets or incurring debts dishonestly. Id, at 169. The penalties could be severe. In one case a bankrupt who hid his assets was publicly tortured and hung and his accomplices were publicly shamed and banished. Id, at 175. Bankruptcy did not cover an honest

litigation involving debt enforcement.[20] Understaffed and overworked courts were largely financed by fees paid by creditors who used courts to enforce debts.[21] The substantive and procedural rules governing debt claims minimized the burden processing debt claims placed on courts and maximized the pressure a creditor could bring to bear to coerce a debtor to pay, and to punish a debtor who the creditor thought merited punishment, when a creditor chose to pay the hefty price of using the legal system to enforce a debt.

During much of this period a creditor would have brought a claim under the writ of debt to enforce a debt. The form of the writ literally was an order to the sheriff to tell the debtor to pay the debt or to appear in court on a designated date. Simpson observes:

> The form of the writ is at first sight rather curious; it begins with an order, to be transmitted through the sheriff, to pay the debt, and ends, as a sort of afterthought, which a passage that recognizes that the recipient of this order may question its justice and seek adjudication upon his liability to pay.[22]

A claim under the writ of debt generally required close to nothing in the way of adjudication by a court. A claim had to be for a sum certain, either a liquidated sum or an ascertained sum.[23] If an unconditional debt was embodied in a bond (a sealed instrument which bound the debtor to pay a sum certain), then the instrument generally was

failure. Hardwick finds judges generally were lenient and reluctant "to find behavior that justified bankruptcy." Id, at 176.

[20] Muldrew estimates "that in the 1680s the court was needed to enforce 2-5 percent of the value of transactions made within the town to keep credit working. In global terms, this is possibly 2-5 times the amount of credit sued over today." MULDREW, *supra* n. 19, at 268.

[21] Francis, *Practice, Strategy, and Institution: Debt Collection in the English Common-Law Courts 1740-1840*, 84 NW. U.L. REV. 807 (1986).

[22] A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT (Oxford, 1975), at 54.

[23] Id, at 61.

conclusive.[24] Parol evidence was inadmissible to vary the instrument.[25] The only defenses available were that the debt had been paid or a challenge to the instrument itself, e.g., that the debtor was mistaken about the nature of the instrument or they were coerced into signing the instrument.[26]

Debt enforcement before the 19th century was unabashedly punitive. If a debtor did not pay a debt when sued (or appear and successfully defend the claim), then a creditor could demand execution against a debtor's body or chattels (he could not have both). Tightening the screws, a debtor had to pay a prevailing creditor's costs, both legal fees and court costs, which were exorbitant.[27] Further tightening the screws, if a debt was large enough, and a creditor was willing to incur the additional cost and risk of a claim getting sidetracked on procedural issues, then a creditor could have a debtor arrested immediately or his assets attached. A debtor would be held in jail unless he paid the debt or made bail, which required getting two people to stand as sureties that the debtor would appear in court and pay the judgment. The sheriff had no discretion in executing a writ to arrest a debtor or to attach his assets. The sheriff faced a risk of personal liability if he did not faithfully carry out the order to arrest a debtor or attach his assets.

This arrangement made a great deal of sense at the time. An artisan or farmer with excess capacity is better off doing an exchange on credit than allowing capacity to go unused so long as the default rate is not too high. The obvious and natural thing to do in an economy based on credit is to forgive a debt when a debtor is unable to pay because of

---

[24] D.J. IBBETSON, A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS (Oxford, 1999), 20-21. The writ of debt could also be used to recover debts arising from informal transactions when a debt was not embodied in a bond. SIMPSON, *supra* n. 22, at 73. When a claim was not on a bond, a defendant was permitted to "wage their law." The availability of the defense did not burden courts for a claim would be dismissed without further investigation if the defendant and eleven "oath helpers" denied the claimed sum was due. IBBETSON, *supra*, at 32-33. When the action of assumpsit became available to enforce debts creditors generally used assumpsit to enforce informal debts, to deny a debtor this defense, while creditors continued to use the writ of debt to enforce formal debts. Assumpsit had its own pleading rules to reduce the burden on courts in processing claims.

[25] SIMPSON, *supra* n. 22, at 95-96.

[26] Id, at 98-99.

[27] Francis, *supra* n. 21, at, 821-824. Francis reports that on average legal fees and expenses were a large multiple (six to seven times) the amount of a debt. Id, at 858-859,

misfortune.[28] Leniency is good for business (you don't want to scare away future customers) and basic human decency. On the other hand, no mercy was shown to people who refused to pay a debt they could pay, or who incurred a debt they expected not to pay. People who do this are worse than thieves because they prey on a creditor's trust. Their conduct also threatened an economic system based on personal credit and in which almost all wealth was precarious. Creditors who were willing to pay the hefty legal fees charged by courts of record were given unfettered discretion to decide when to punish a defaulter. Reformers complained about "the power that the law gave to creditors . . . But most advocates of reform, no matter how much they deplored imprisonment, still maintained that the law had to retain some kind of coercive force so that the creditors might be justly satisfied whenever possible."[29]

c. The shift to asset- and wage-backed debt.

The development of better means to secure payment made it possible to abolish debtor's prisons in the 19th century. Peter Coleman catalogs many of the changes.[30] They include “the chattel mortgage,”[31] “the conditional sales contract, which gave the seller the right to repossess goods if the buyer failed to meet all of the installment payments,”[32] “the promissory note” that “confessed judgment in advance,” and the availability of garnishment (“there was no need to imprison a defaulter when the creditor could get direct

[28] Leniency was common. Muldrew estimates "[t]he annual forgiveness of debts in mid-century would have been 20 times the average figure of positive charity and possibly much more." MULDREW, *supra* n. 19, at 305.

[29] Id, at 289. In England, so-called "courts of conscience" offered creditors a much less expensive mechanism for enforcing small debts. In principle, the commissioners in these courts were supposed to work with honest debtors to compel people to pay what they could, and only to imprison debtors who the commissioners determined merited punishment. Whether this is how it worked in practice is debatable. See FINN, *supra* n. 18, Chapter 5.

[30] PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA (State Historical Society of Wisconsin, 1974). Debtor's prisons were abolished in the mid-19th century in the U.S. England had a dual system for enforcing personal debts into the 20th century. People with debts large enough to qualify for bankruptcy were treated relatively leniently in a proceeding that divided their assets among creditors and discharged the debt. Small debtors were dealt with in county courts that set repayment terms based on a debtor’s perceived ability to pay and could imprison a debtor who failed to satisfy these terms. Johnson, *Creditors, Debtors, and the Law in Victorian and Edwardian England*, in Steinmetz (ed.) PRIVATE LAW AND SOCIAL INEQUALITY IN THE INDUSTRIAL AGE: COMPARING LEGAL CULTURES (Oxford, 2000), 485.

[31] COLEMAN, *supra* n. 30, at 261.

[32] Id.

access to a debtor's income").[33] In urban areas, a pawnbroker took a chattel as security for a loan.[34] In rural areas, a lender could take a crop lien.[35] "Legislatures made debt recovery easier and more certain by improving the procedures for foreign and domestic attachment, expanding chancery procedures to debt-collection cases, and by making most forms of property subject to direct execution."[36]

Some of these enforcement mechanisms existed long before the 19th century. Pawnshops had been around for centuries.[37] Other mechanisms, like chattel mortgages, were developed in the late 18th or early 19th century.[38] These developments were made possible by the growth of wealth in the 19th century, the increased availability of cash and cash equivalents (e.g., notes and bills of exchange), and the growth of the financial sector. A pawnshop requires capital and cash on hand. Some of the developments required improvements in what is now called information technology. Chattel mortgages require a sophisticated recording system as well as creditors with the resources and savvy to use the information system.

U.S. courts generally took the side of creditors when new enforcement mechanisms were challenged. Installment contracts to purchase property are an example.[39] Initially U.S. courts held that equitable rules that protect a mortgagee from forfeiture of his equity on default did not apply to an installment contract to purchase property.[40] As a consequence, a purchaser who failed to make an installment payment forfeited both his interest in the property and payments already made. This rule was tough on purchasers who often were

---

[33] Id, at 262.

[34] Id.

[35] Id, at 264.

[36] Id, at 265.

[37] See JOHN P. CASKEY, FRINGE BANKING (1994), chapter 2, esp. 15-22.

[38] Flint & Alfaro, *Secured Transactions History: The First Chattel Mortgages Act in the Anglo-American World*, 30 WM. MITCHELL L. REV. 1403 (2004), report that the first chattel mortgages were in the American south in the late 18th century, challenging the conventional wisdom that they originate in the 1820s in northeastern states.

[39] Freyfogle, Vagueness and the Rule of Law: Reconsidering Installment Land Contract Forfeitures [1988] DUKE L.J. 609.

[40] Glock v Howard & Wilson Colony Co., 55 P. 713 (Cal. 1898).

"poorly informed, inadequately represented, and relatively low in income."[41] Toughness was thought justified because it encouraged providing credit to poor people who could not qualify for a mortgage. This rule gave way in the middle of the 20th century as U.S. courts adopted more lenient rules to protect installment purchasers.[42]

There was little in the way of credit regulation in the 19th century other than usury laws, which were liberalized during this period.[43] Credit regulation begins in the late 19th and early 20th century and was initially directed at small-scale lenders (aka "loan sharks"). Anne Fleming tells this story in *City of Debtors*.[44] She focuses on the city and state of New York to give readers a sense of how small-scale lenders responded to a patchwork of municipal, state, and federal regulation. Fleming describes the problem of regulating small-scale lending as “a game of whack-a-mole, as restrictive states beat down one form of illegal lending only to find another popping up in a different corner.”[45] For example, at the turn of the 20th century small-scale lenders used wage-assignment agreements.[46] When these were outlawed for cash loans early in the century, creditors “relied on confessions of judgment,” and mass-filings in accommodating courts to get garnishment orders.[47] Or they used “salary-purchase” agreements.[48] All of these mechanisms made it possible for a creditor to obtain possession of a debtor’s wages with little or no legal process.

[41] Freyfogle, supra n. 39, at 610. Often purchasers were Black people who could not obtain mortgage financing because of red lining. Miltko, *What Shall I Give My Children?": Installment Land Contracts, Homeownership, and the Unexamined Cost of the American Dream*, 87 U. CHI. L. REV. 2273 (2020).

[42] *Barkis v Scott*, 208 P.2d 367 (Cal. 1949).

[43] JEREMY BENTHAM, IN DEFENSE OF USURY (1787), is the classic challenge to usury laws. It is a series of letters the last of which responded to Adam Smith, who defended laws that capped legal interest somewhat above the prevailing rate on the view this kept capital out of the hand of people who would use it imprudently. MORTON J. HOROWTIZ, THE TRANSFORMATION OF AMERICAN LAW: 1780-1860 (1977), at 237-245, reports legal writers who advocated liberalizing usury laws embraced Bentham’s ideas. For more on the intellectual and political history of usury laws in the 19th century and a timeline of changes in the law, see Hugh Rockoff, *Prodigals and Projectors: An Economic History of Usury Laws in the United States from Colonial Times to 1900,* in HUMAN CAPITAL AND INSTITUTIONS A LONG-RUN VIEW (2009).

[44] ANNE FLEMING, CITY OF DEBTORS: A CENTURY OF FRINGE FINANCE (2018).

[45] Id, at 8.

[46] Id, at 50.

[47] Id, at 50-51.

[48] Id, at 51.

Wage-assignment agreements remained legal in sales-financing until the middle of the 20th century.[49] Sellers on credit adopted the strategy of assigning notes to finance companies to eliminate counterclaims by a buyer that a good was defective.[50] The rent-to-own industry "was born" in the 1950s and 1960s as regulation of installment sales increased.[51] The legal innovation in rent-to-own, and the argument that these were leases and not sales, was that customer had the right to stop making payments by terminating the lease and returning the good.[52] Pay-day loans and car-title loans are late 20th centuries innovations. The pay-day loan business model basically is a tweak on a lending model that grew out of the check-cashing business in which a lender takes an advanced-check in return for a cash.[53]

d. The debtor-side landscape today.

Most innovations in debt in the 20th century involve the provision of credit and not enforcement. The credit card is the most significant private innovation in personal credit in the second half of the 20th century.[54] The 30-year home mortgage and student loans are important government-sponsored innovations. The home equity line of credit is a mid-20th century private innovation that primarily serves (and taps) wealthier households.[55] Most credit card debt, like most mortgage-backed debt, is securitized, which is a later 20th century innovation.[56] Products that are created to serve wealthier households often are modified so a lender can make a profit while serving poorer households. Fleming describes how finance companies targeted low-income communities in marketing high-price home

---

[49] Id, at 118.

[50] Id, at 145-148, 183-185.

[51] Id, at 220.

[52] Id, at 221.

[53] Id, at 235-240.

[54] THOMAS DURKIN, ET AL, CONSUMER CREDIT AND THE AMERICAN ECONOMY, Chapter 7.

[55] *Home Equity Taps the American Dream*, ABA BANKING J. 50 (April 1987).

[56] DURKIN, ET AL, supra n. 54, at Chapter 5.

equity loans.[57] And some credit cards target sub-prime borrowers through risk-based pricing.[58]

On the enforcement side, the post-judgment remedies a creditor can get against a debtor include "garnishment of wages or bank accounts, liens on property, or the ability to levy on personal property."[59] Garnishment is an order to an employer or a bank to pay the judgment creditor. Under federal law, no more than 25 percent of a worker's disposable earnings can be garnished.[60] Some states protect more. States also protect some assets from execution. Texas law is particularly generous. It protects all earnings, the homestead, and a significant amount of personal property and financial assets.

Laws that protect assets from execution do not protect assets pledged as security for a loan. The creditor's remedy when a debtor defaults on a secured debt, or when a tenant does not pay rent, is to take possession of an asset. If a debt is a mortgage secured by real property, then the debtholder (the mortgagee) is likely to have to use legal process to foreclose. State law varies in the protection afforded the mortgagor's equity in the property on foreclosure. If a debt is secured by personal property, then a creditor may use legal process (the writ of replevin) to get the sheriff to seize the property for them. A creditor may also use self-help if repossession is possible without "disrupting the peace." This is an area of continual innovation as creditors devise new techniques for asset-backed financing that make it easier to take collateral. A creditor-controlled electronic kill switch in a car or expensive piece of machinery is a 21st century variation on the pawnshop.

Debtors who default may still face draconian consequences in addition to loss of income, their home, or their car. In most states, magistrates and judges can and do issue civil arrest warrants if a debtor fails to appear at a post-judgment proceeding or fails to

---

[57] FLEMING, supra n. 44, 2at 33-234.

[58] Adam J. Levitin, *Rate Jacking: Risk-Based & Opportunistic Pricing in Credit Cards*, 2011 UTAH L. REV. 339.

[59] NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTIONS § 1.4.11.

[60] Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677 (1982). For very low wage workers the relevant cap is 30-times the federal minimum wage. This lower cap basically covers people who work less than 40-hours per week for minimum wage.

provide information about their finances.[61] In some places, debt collectors partner with prosecutors to threaten people who have bounced a check with criminal prosecution under statutes that make it a crime to knowingly write or pass a bad check.[62] Actual prosecutions appear rare but imprisonment remains a threat.

Only a small fraction of people default, and creditors often do not pursue legal remedies against those who do. Still, many people experience garnishment, foreclosure, or eviction. In 2013 and 2016, around 3 percent of US employees (4 million people) had wages garnished for consumer debt or student loans.[63] Since 2003, around 100 to 200 thousand mortgages entered foreclosures each quarter. This number spiked to almost 600 thousand per quarter in 2009, during the great recession, and dropped to close to zero during the pandemic as a result of a moratorium on foreclosures.[64] A study of Milwaukee renters found that 1-in-8 renters reported they experienced a forced move within two years of being surveyed, with 48% of these being by informal eviction and 24% being by formal eviction.[65]

In the U.S. a debtor in default can stop collection efforts by filing for bankruptcy. An individual can choose between a Chapter 7 liquidation, in which they give up all their non-exempt assets in return for discharge from loans that are subject to discharge, and a Chapter 13 payout plan, in which they agree to plan to repay all or a fraction of their loans over time in return for a stay of execution and eventual release from debts forgiven under the plan. People in default on a mortgage sometimes choose Chapter 13 because they can stop

[61] Jennifer Turner, American Civil Liberties Union, *A Pound of Flesh: The Criminalization of Private Debt* 6 (2018).

[62] Id, at 6-7.

[63] NATIONAL CONSUMER LAW CENTER, FAIR DEBT COLLECTIONS § 1.4.11, citing ADP Research Institute, The U.S. Wage Garnishment Landscape: Through the Lens of the Employer 7 (2017).

[64] Federal Reserve Bank of New York, *Quarterly Report on Household Debt and Credit*, 2022:Q1 (May 2022), 16.

[65] MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016), 330-331. Of the eviction proceedings, 92% were based on the tenant not paying rent and the median amount of back rent owed was less than two months. Matthew Desmond, *Eviction and the Reproduction of Urban Poverty*, 118 AM. J. SOC. 88, 101 (2012),

foreclosure. But most people who go this route fail and end up back where they started.[66] Many debtors in default, including debtors who have been sued by their creditors, do not file for bankruptcy.[67] Some people simply cannot afford to file for bankruptcy.[68] A 2005 law made it harder for individuals to file for bankruptcy, including adding a means test for Chapter 7.[69] A 2018 paper reports that as a result people in financial distress generally waited longer to file for bankruptcy, and that people who eventually filed for bankruptcy after a prolonged delay were in a much worse position financially, physically, and emotionally.[70]

Much debt enforcement activity occurs outside of the legal system and involves creditors and collection agencies cajoling and harassing debtors to pay what they can. A 2015 study by Joe Deville of debt collection practices in the United Kingdom is based on interviewing debtors and observing debt collectors at work.[71] Debt enforcement is more strictly regulated in the UK than in the US, and the option of taking a debtor to court is more expensive and less fruitful.[72] The enforcement techniques Deville describes are calculated to make debtors anxious and, if a debtor is recalcitrant, often involve tacit threats of damaging credit reports, contacting employers, and legal action (English law prohibits explicit threats).[73] Debtors interviewed by Deville attest to the painful impact of these

---

[66] TERESA A. SULLIVAN, ELIZABETH WARREN, AND JAY WESTBROOK, THE FRAGILE MIDDLE CLASS: AMERICANS IN DEBT (Yale 2000), at 11-15. Typically, a secured creditor remains entitled to be repaid the full amount of the debt in a Chapter 13 bankruptcy if the value of asset covers the debt, though the interest rate may be adjusted. The automatic stay prevents the asset from being seized. For assets other than a home, a secured creditor can be forced to take an amount equal to the value of the asset in satisfaction of its interest even though this amount is less than the amount of the debt. This is called a "cramdown." The balance of the debt is treated as an unsecured debt. The 2005 Bankruptcy Reform eliminated cramdowns for automobile loans that were less than 910 days (2.5 years) old.

[67] Richard M. Hynes, *Broke But Not Bankrupt: Consumer Debt Collection in State Courts*, 60 FLA. L. REV. 1, 4-5 (2008)(reporting less than 20% of debtors sued for non-payment in 2001 filed for bankruptcy by 2006).

[68] In 2018, the average cost to hire an attorney was $1224 for Chapter 7 and $3442 for Chapter 13. Foohey et al, *Life in the Sweatbox*, 94 NOTRE DAME L. REV. 219, 229 (2018).

[69] Bankruptcy Abuse Prevention and Consumer Protection Act, Pub. L. No. 109-8, 119 Stat. 23 (2005).

[70] Foohey et al, *supra* n. 68.

[71] JOE DEVILLE, LIVED ECONOMIES OF DEFAULT (Routledge 2015).

[72] Id, at 114-115.

[73] Id, at 89-105.

techniques on themselves and their families in moving terms.[74] Deville also observes that debt collectors understand that they are usually competing against each other "to convince existing debtors to pay *you* over others, *before* paying others, for as small an outlay as possible."[75]

U.S. courts still spend very little time processing debt claims. Often the debtor does not appear and the creditor will get a default judgment.[76] Before the "due process revolution" of the 1960s and early 1970s, a debtor had no right to appear if state law allowed garnishment or replevin prior to a hearing,[77] or if a contract had a "confession of judgment" clause.[78] The due process cases were hard fought victories for consumer rights lawyers,[79] but they did not move the constitutional needle much in the direction of protecting debtors. Later cases hold little prior process is required before a court may order garnishment or replevin,[80] and no prior process is required if collection does not involve a state actor.[81]

e. The creditor-side landscape today.

Modern financial capitalism has changed debt's landscape in one important respect. The relevant changes are reflected in changes in the composition of household wealth. In early commercial England, financial assets represented a small fraction of household

[74] Id, at 58-69.

[75] Id, at 117.

[76] Federal Trade Commission, *Repairing a Broken System: Protecting Consumers in Debt Collection Litigation* (July 2020), at 7, estimates default judgments are entered in 60% to 95% of consumer debt collection cases. See also Paula Hannafor-Agor and Brittany Kaauffman, *Preventing Whack-A-Mole Management of Consumer Debt Cases* (2020), 6-8 (reporting other estimates in this range and identifying reasons for the prevalence of default judgments).

[77] *Snaidach v. Family Finance*, 395 U.S. 337 (1969), held due process required an opportunity for a hearing before garnishment. *Fuentes v. Shevin*, 407 U.S. 67 (1972), held the same for replevin.

[78] *D.H. Overmeyer Co. v. Frick Co*., 405 U.S. 174 (1972), is the leading case involving a due process challenge to a confession of judgment clause. Almost every state now has statutes invalidating confession of judgment clauses in consumer loans. These clauses remain ubiquitous and enforced in commercial leases and loans. See H. Ward Classen, Jeanne de Cervans, Robert K. Rowell, and James C. Wines, *A Survey of the Legality of Confessed Judgment Clauses in Commercial Transactions*, 47 BUSINESS LAWYER 729 (1992).

[79] FLEMING, supra n. 44, at 195-210.

[80] *Mitchell v. W.T. Grant Company*, 416 U.S. 600 (1974).

[81] *Flagg Brothers v. Brooks*, 436 U.S. 149 (1978).

wealth, and this was entirely comprised of coin or personal debt of another household.[82] There was no paper currency, public debt, or stock or debt issued by business entities. Today a large share of household wealth is represented by financial assets in the form of claims against business entities (debt and equity), financial intermediaries, or states (public debt).[83] Personal debt is largely held by business entities and financial intermediaries.[84]

These changes in the composition of household wealth are the product of tectonic changes in human wealth and debt. There has been an enormous increase in human wealth embodied in income producing assets (both tangible and intangible), owner-occupied housing, and consumer durables. Personal debt basically is a claim against an individual 's income. Unless a debtor holds income-producing assets personal debt is a claim against a debtor's labor income even when the debt is backed by a consumer durable like an owner-occupied house, car, or electronic device with a kill switch. Claims against other people's labor income still represent a significant share of private wealth,[85] though this is a much smaller share of private wealth than it was early commercial England.

[82] MULDREW, *supra* n. 19, at 25-26, collects data from probate records that do not include land as an asset. The accounts record the value of goods, animals and crops, debts held, debts owed, and cash in hand. Throughout the period generally more than 90% of household wealth was in the form of goods (in the household or shop) plus animals and crops in rural areas. The balance was largely comprised of debt held by the deceased. The value of debt held by an estate generally was a multiple (sometimes a very large multiple) of cash in hand. This wealth was concentrated. In one parish (Hampshire), credit (debt held) "was concentrated in a very few households" (eight to be precise) who "were generally wealthy." Id., 117. Only these eight households on average held more debt than they owed. Id., 118. Almost all decedents had significant debts when they died. Poorer households had greater debts than assets.

[83] U.S. Census Bureau, *The Wealth of Households* (Aug. 2022), reports that in 2020 financial assets were over 60% of household wealth, comprised of retirement accounts (36.2%), stocks and mutual funds (11.1%), assets at financial institutions (8.3%), other financial assets (5.0%.), and bonds (1%). Home equity was 27.8% of household wealth and vehicles were 2.3%. The remainder is interests in real estate and closely held businesses.

[84] Student loans are an exception in the U.S. Student debt is largely held by the U.S. government.

[85] In 2022 Quarter 4 the total net worth of U.S. households was $147.71 trillion while the total debt balance of U.S. households was $16.90 trillion. Federal Reverse Bank of New York, *Household Debt and Credit 2022:Q4*. A seat-of-the-pants calculation suggests around 10 percent of personal wealth in the U.S. is embodied in claims against other people's labor income. This estimate excludes student debt, which is largely held by the government.

One change associated with the enormous increase in wealth has already been noted. Today most debt, including over 80 percent of personal debt, is asset backed.[86] In early commercial England, asset-backed debt was rare. Real estate (i.e., land, buildings, and other improvements) was the most significant form of wealth owned by humans. Real estate was not used as a basis for credit (other than purchase-money mortgages) because it was difficult to execute against real estate.[87]

The normatively important change is financial intermediation. Debt used to be held directly by other people. Now debt is held by business entities and financial intermediaries. In addition, and relatedly, personal wealth is much less precarious for people with significant wealth. The creation of limited liability business entities makes it possible for people to invest wealth in an enterprise without putting other wealth at risk.[88] The development of modern securities markets makes it possible for wealthy people to spread and hedge their bets. And developments in trust law enable very wealthy families to preserve their wealth.[89]

---

[86] Federal Reverse Bank of New York, *Household Debt and Credit 2022:Q4* reports 71% of household debt was mortgages, 2% was revolving home equity loans, and 9% was auto loans. Of the balance, 9% was student loans and 6% was credit card debt.

[87] In early commercial England, an unsecured creditor could not levy against a debtor's land. CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND LEGAL INSTITUTIONS IN EARLY AMERICA (Princeton 2021), 62. The most an unsecured creditor could get by levying against land was through the writ of elegit to acquire the right to use the land for a debtor's lifetime. Id., 62-63. In addition, much land owned by wealthy families was held in a form (the common law entail) that required land remain within the family. A family member with control of entailed land generally only had power to alienate the right to income from the land or the right to use the land during their life. When a family member with control of entailed land pledged it as security for a loan, the most a creditor could get through legal process was a right to use the land for a debtor's lifetime. BECKERT, INHERITED WEALTH (Princeton University Press 2008)(Thomas Dunlap, trans.). One function served by the threat of imprisonment was to coerce a debtor to convey or to sell land they owned to repay a debt, or to a coerce a family to remove an entail, which could be done either by an Act of Parliament or by consent of all interested family members. PRIEST, *supra*, at 67.

[88] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (Princeton 2019).

[89] Spendthrift trusts enable wealthy people to prevent their heirs from squandering wealth. More recently, asset-protection trusts, like a Cook Island trust, enable wealthy people to hold wealth offshore in a form that creditors cannot directly reach. Even more recently, the abolition of the rule against perpetuities and the recognition of a "purpose trust" that does not have a designated beneficiary makes stateless dynastic wealth possible. BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS (Harvard 2020). As the story of Sackler family shows, wealthy people can use business entities and bankruptcy strategically as leverage to be able to bargain to retain wealth obtained through illegal enterprises. Jonathan C. Lipson, *The Role of the Deal: Bankruptcy Bargains and Other Misnomers*, 97 AM. BANKR. L.J. 41 (2023).

These changes alter debt's normative landscape. Personal debt and business debt should be separated because they present different normative problems, putting to the side border-line cases like small business debt and debt claims by people against financial intermediaries (e.g., pension and insurances claims and bank deposits). The value of efficiency should dominate in setting rules governing business debt because limited liability and the availability of other ways to protect wealth means default by a business entity usually will not have a life-changing impact on people who invest in a business.

The debtor and creditor sides of personal debt should also be separated. The value of efficiency should dominate in setting rules governing the creditor side of personal debt because this is like business debt. The intermediation of debt means slight changes in the default rate will not have a life-changing impact on investors. If credit providers adjust prices in response to an increase in the default rate, then changes in the default rate will have no impact on investors (other than perhaps slightly lowering the yield on investment).

The value of autonomy should dominate in setting rules governing personal debt enforcement. Access to credit can have positive life-changing effects on people and debt enforcement can have negative life-changing effects on people. In setting rules governing debt enforcement, lawmakers must balance peoples' interest in access to affordable credit and the interests of people who default or who pay in distress in minimizing pain Economics is well-suited to solving this sort of regulatory problem. I will return to whether moral theories of contract have anything to add in solving the regulatory problem. But I begin with what these theories say about how a creditor may appropriately treat a debtor in enforcing personal debt.

3) THE MORALITY OF COMMERCIAL EXCHANGE

This Section examines two important theories of contract law that aspire to justify contract law on liberal grounds while arguing contract law appropriately embodies the morality of commercial exchange. Charles Fried, *Contract as Promise* (1981), got what are called autonomy theories of contract off and rolling. Peter Benson, *Justice in Transactions* (2019), is the state of the art in this type of theory. Both Fried and Benson take the position contract law allows a person to use a contract exploit a pre-existing advantage over another person, so long as minimal requirements are met (e.g., the other party knows what they are getting into and/or there is a reasonably well-functioning market). This position is not problematic for a libertarian, but it is difficult to square with liberal values. Fried and Benson try to square contract law with the liberal commitment to promoting autonomy and equality by arguing contract law need only secure formal autonomy and equality. They argue other institutions are responsible for addressing social evils that result from the unequal distribution of wealth.[90]

This position is implausible in the case of personal debt for its implications are palpably unfair because of the unequal distribution of wealth, the harsh terms creditors must demand from high-risk debtors to make a profit, the necessarily punitive enforcement of personal debt, and the painful and often life-changing stakes to people of losing their home, car, or essential income. Leaving it to the market to decide what punishment creditors may inflict on defaulters may be defensible as a matter of economics and ex ante preference satisfaction, but this arrangement is difficult to justify on the ground that it promotes individual autonomy and equality. But this is precisely what Fried and Benson must claim. As you shall see, Fried is more willing than Benson to accept the harsh implications of this position but even Fried acknowledges the need for some rules protecting debtors. I will come back to what Fried and Benson say about debt, and why their account of the morality of contract law inevitably leads to the conclusion that creditors may demand and enforce as harsh enforcement terms as the market allows, after I sketch their accounts of contract law.

a. *Contract as Promise*.

In a 2012 retrospective, Fried explains he wrote *Contract as Promise* in reaction to the "anti-individualist and anti-capitalist" accounts of contract law, and to "assert the coherence of standard contract doctrine . . . based on a morality of autonomy, respect for persons, and trust."[91] Fried argues that "[t]he convention of promising" makes an

---

[90] Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1401 (2016).

[91] Charles Fried, *The Ambitions of Contract as Promise*, Klass, et. al. eds., PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW (Oxford 2014), 17, 18, 20. The 1981 book does not address economic theories of contract, which it largely predates. In the retrospective, Fried observes his version of autonomy theory is not opposed

individual as “free as possible,” consistent with “the similar will of others,” because it facilitates projects that require commitment.[92] A promise is morally binding because “[b]y virtue of the basic Kantian principles of trust and respect, it is wrong to invoke that convention in order to make a promise, and then to break it.”[93] “[T]he obligation of contract [is] only a special case” that flows from a “general obligation to keep promises.”[94]

Fried devotes much of *Contract as Promise* to explain "how this conception generates the structure and accounts for the complexities of contract doctrine."[95] Fried later backed off from this analytic claim. His error relates to the normative problem he set out to solve, which is to explain why “persons may impose on themselves obligations where none existed before,”[96] when a promisor has obtained no benefit through her promise[97] and the promisee has not relied on the promise.[98] This way of framing the normative problem equates contract with the paradigmatic contractual type of classical contract law, which is an exchange of promises, rejecting out of hand reasons that explain the force of a promise in terms of benefit or reliance because these reasons cannot explain why executory contracts are enforced.[99] This treats debt—an obligation based on a half-completed exchange—as normatively uninteresting.

This was a misstep analytically. If Fried had acknowledged that benefit and reliance bear on why contract law enforces promises, then he might have avoided an error he conceded later. The error relates to the difficulty Fried confronted in giving a satisfactory

---

to economic theories of contract for they share an ex-ante perspective. “Most distinctive for both the law-and-economics analysis of contracts and the morality of promising that underlies *Contract as Promise*,” Fried writes, “is the assumption that individuals (promising or contracting) have a certain persistence as entities over time-what an individual chooses for his future he is choosing for himself and not for another person . . . and what he gets by that choice he may not complain of as if it had been chosen for him by someone else.”

[92] FRIED, *supra* n. 4, at 13.

[93] Id, at 17.

[94] Id.

[95] Id, at 6.

[96] Id, at 1.

[97] Id, at 10.

[98] Id, at 18-19.

[99] Id, at 29.

account of contract doctrines that do not enforce, or that seem to under-enforce, certain promises.[100] Fried missed a broad set of reasons that explain why for centuries English courts only enforced promises that satisfied the action of debt's requirements (either a half-completed exchange (i.e., benefit-plus-reliance) or use of a deed). This broad set of reasons all relate to a general criticism of *Contract as Promise* summarized by Charlie Webb: "to focus on theories of promissory obligation when looking for a theory of contract is a failure to grasp the task at hand," which is to answer "the official's question, 'When should I, on behalf of the state and backed by its coercive machinery, order that promises be performed or take measures against those who have broken them.'"[101]

Fried acknowledges the force of this general criticism in the 2012 retrospective while referring to the mitigation rule: "the requirement of mitigation, and much else, are practical necessities if the government is to become involved in enforcing agreements at all . . . my claim in *Contract as Promise* about the relation of the legal regime of contract to the moral institution of promising was not so much wrong as overstated."[102] Fried concedes the same may be true of the doctrine of consideration. "In the case of gratuitous promises," Fried writes in 2012, "the law may simply wish to reserve its scare resources for more serious matters, and what counts as more serious must inevitably by left to the laws and its officers' judgment."[103] This is close to a concession that contract law serves "a distinct collective policy, the furtherance of economic exchange."[104]

[100] The doctrine of consideration is an example. Like many others, Fried finds the doctrine of consideration conceptually unsatisfying. He argues the bargain theory of consideration, which requires a promise be made as part of an exchange, is "internally inconsistent," and unable to explain the pattern of decisions. Id, at 33. He concludes "the standard doctrine of consideration . . . does not pose a challenge to my conception of contract law as rooted in promise, for the simple reason that the doctrine is too internally inconsistent to offer an alternative at all." Id, at 35. Notably, Fried rejects an alternative approach that "distinguishes gratuitous promises, that is promises to make a gift, from true bargains," because this approach would locate the basis of contract "in a distinct collective policy, the furtherance of economic exchange." Id, at 36.

[101] Charlie Webb, *Contract as Fact and as Reason*, in Klass et. al., eds., PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW (Oxford 2014), 135, 148.

[102] Fried, *supra* n. 91, at 34.

[103] Id, at 36.

[104] Id.

b. *Justice in Transactions*.

Benson also starts from the premise the central problem a normative theory of contract must solve is to explain why a wholly executory agreement is enforceable.[105] But Benson does not identify promising as the causative event of contractual obligation and so he avoids some of the analytic snares that entrapped Fried (such as the difficulty Fried had explaining the requirements of consideration and mitigation). Benson describes his theory as a transfer theory. His theory could as well be described as an exchange theory for an exchange transaction--specifically an exchange of promises--is Benson's paradigmatic contractual transaction. Tellingly, Benson elucidates the moral basis for contract as a transfer of ownership by drawing an analogy to a barter exchange transaction and the moral power of people as owners of things to exchange things.[106] Barter exchange was rare even before money was a common medium of exchange. Benson could place his theory on firmer anthropological ground if he had drawn an analogy to a credit transaction and the moral power of a person as an owner of a thing to exchange a thing for a debt.[107]

Benson makes an important contribution to analytic contract theory by showing that much of modern contract law can be explained as instances of a general duty on parties to a contract to act reasonably within the framework of the agreed exchange. Benson explains implied terms as instances of this requirement of reasonableness: "[i]mplication has to do with what a party can reasonably be held to presume of the other in the framework of their transaction."[108] He continues: "[i]n a sense, the parties may objectively be viewed as having placed themselves under the protection of the reasonable, trusting in the law's articulation and upholding of it."[109] Benson grounds several modern doctrines that are unnecessarily controversial in the U.S. on the general requirement of reasonableness. These

[105] BENSON, *supra* n. 4, at 5.

[106] Id, at 325 et seq.

[107] DAVID GRAEBER, DEBT THE FIRST 5,000 YEARS (Melville House 2011), at 38. A. Mitchell Innes, *The Credit Theory of Money*, BANKING LAW JOURNAL 151 (1914), is an early paper making the same point.

[108] BENSON, *supra* n. 4, at 143.

[109] Id, at 144.

include the duty of good faith,[110] the doctrine of reasonable expectations,[111] and the unconscionability doctrine.[112]

Turning to Benson's normative argument, he is commendably clear about the "juridical conception of the person" he argues undergirds contract law.[113] Readers will immediately recognize this "conception of the person" as "economic man." Benson's "juridical conception of the person" could also be described as the moral norms that guide economic man in his interactions with other people. (I suspect Benson uses the expression "juridical conception of the person" to avoid calling these moral norms a person would appropriately be guided by in interactions with other people.)

David Graeber, an anthropologist and anarchic activist, calls these norms the morality of “commercial exchange."[114] This morality accepts money as the measure of value;[115] valorizes the accumulation of money and material goods;[116] tends “to reduce all human relations to exchange;”[117] accepts “the logic of the market, where we like to imagine we start out as individuals who don’t owe each other anything;”[118] is “impersonal;”[119]and assumes “both parties to the transaction are only interested in the value of goods being transacted [so] they may well—as economists insist they should—try to seek the maximum material advantage.”[120] Graeber laments the world of modern capitalism that flourishes in commercial economies: “a gigantic financial apparatus of credit and debt that operates--in practical effect--to pump more and more labor out of just about everyone with whom it

[110] Id, at 157.

[111] Id, at 148.

[112] Id, at 167-191.

[113] Id, at 367 et seq.

[114] GRAEBER, *supra* n. 107, at 103.

[115] Id, at 46-48

[116] Id, at 125-126.

[117] Id, at 18.

[118] Id, at 71.

[119] Id. This is in the sense that who is on the other side of the transaction is “entirely irrelevant. We are simply comparing the value of two objects."

[120] Id.

comes into contact, and as a result produces an endlessly expanding volume of material goods."[121]

Benson gives a clear-eyed account of how the market shapes humanity and human interaction that is only somewhat less jaundiced than Graeber's account. Benson explains the market is a "self-generating social process that becomes ever more established . . . as individuals participate in it: the more they seek satisfaction of their needs and interests in this way-as they must-the more complete their dependence on each other becomes and the more pervasive and necessary the system itself . . . [as] each participant, acting and producing on his own account, eo ipso acts and produces for the needs and interests of everyone else."[122] The market "educates"[123] people to be "moved by the thought of what others may need or provide."[124] It encourages relationships that are "impersonal, reciprocal, and mutually voluntary giving and taking that operates on the basis of respect for each side's separate holdings and undertakings."[125] "Finally," the market is not geared to "the realization of distributive justice. Quite the contrary . . . [t]he satisfaction of need depends on the contingent existing distribution of purchasing power . . ."[126] In other words, the market educates and acculturates people without wealth to anticipate and serve the wants and desires of people with wealth. I am sure Graeber would have agreed with all of this, but he would have wondered how anyone could think this could be part of a "public justification" of contract law.

c. The implications for punitive debt enforcement.

Turning back to the law, Fried and Benson take the position contract law embodies the morality of commercial exchange. They argue contract law takes as given the existing distribution of wealth and other sources of advantage over other people and allows a person

[121] Id, at 346.

[122] BENSON, *supra* n. 4, at 420.

[123] Id, at 419.

[124] Id.

[125] Id, at 422-423.

[126] Id, at 423.

to use a contract to exploit a pre-existing position of advantage over another person. Benson argues this follows from people's general liberty under private law to pursue their own interests without regard to the interests of others so long as their action does not create a risk of physical harm to other people or their property.[127] This general liberty also explains the absence of a duty to rescue in tort law and the nearly absolute right to exclude in property law.

It follows that the requirement of reasonableness attaches only once a contract has been made. Thus, the duty of good faith attaches only once a contract is formed and does not apply to formation of a contract.[128] It also follows that the agreed exchange defines the parameters of the requirement of reasonableness. Daniel Markovits makes this point with respect to the duty of good faith in a 2014 paper:[129]

> Even where one side to a contract has leveraged undeserved bargaining advantages in contract formation, so that the substantive terms of an exchange unfairly favor her over the other, she may perform her contract in good faith. Doing so requires only that she respect the contractual settlement, and hence her counterparty's authority to insist on that settlement, and so declines to exploit advantages that arise within the contract . . . to revise that settlement still further in her favor.[130]

Thus, it does not violate the requirement of reasonableness for a landlord to threaten to evict a tenant for not paying rent no matter how harsh the consequences of being evicted to the tenant nor how small the benefit to the landlord of evicting the tenant (e.g., a landlord may threaten to evict a tenant for not paying rent even if this compels a tenant to forgo food or other necessities and there is no possibility of finding another tenant so a place will remain vacant). On the other hand, it violates the requirement of reasonableness for a wealthy debtor to threaten not to pay a debt to coerce a poor creditor who needs immediate

---

[127] In Benson's terms, a person is legally responsible only for an act or omission that impairs someone's exclusive rights "with respect to her body or assets." Id, at 7.

[128] RESTATEMENT, SECOND, CONTRACTS § 205.

[129] Daniel Markovits, *Good Faith as Contracts Core Value*, in PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW.

[130] Id, at 291.

cash to take less than the full sum owed in satisfaction of the debt.[131] Coercion (and even cruelty) is allowed in the first case because it gives effect to the agreed exchange. Coercion is not allowed in the second case because it seeks to revise the agreed exchange.

Fried and Benson are liberals and not libertarians. They try to square the illiberal implications of the position that a person may use a contract to exploit a pre-existing advantage over another person with the liberal commitment to equality and autonomy by arguing that institutions other than contract law are responsible for addressing moral problems created by the unequal distribution of wealth.[132] Fried argues "liberal political morality" makes it necessary "to develop a concept of sharing [life's benefits and burdens] that leaves the person and his liberties intact."[133] According to Fried, in liberal political morality "accommodation is sought through the basic division of function in the modern welfare state between private market (contractual) autonomy and general redistributive welfare schemes. This accommodation assumes that the obligation to share is a general one in which all should participate by tax contributions."[134]

Fried addresses the implications of his position for debt enforcement when he takes up the "exorbitant" credit terms in *Williams v. Walker-Thomas Furniture Co.*[135] Harsh credit terms are not substantively unfair, Fried argues, if "the far greater frequency of default made high prices and harsh credit terms a necessity for doing business with an often nearly

---

[131] *Totem Marine Tug & Barge, Inc. v. Alyeska Pipeline Service Co.*, 584 P.2d 15 (9th Cir. 1978)(holding that a creditor could avoid the settlement on ground of duress, if it could establish that the debtor "deliberately withheld payment of an acknowledged debt, knowing that [the creditor] had no choice but to accept an inadequate sum in settlement of that debt.")

[132] Benson gives a commendably clear-eyed account of the implications of his position. He observes "not only is contract law wholly indifferent to individuals' substantive needs as such. Even more . . .private law ensures their nonsatisfaction by barring propertyless free and equal persons from accessing the material they need . . ." BENSON, *supra* n. 4, at 434. Benson is less clear about the reasons of "capacity" that require a "division of labor" between private law and public law. Id, at 455. Benson allows for the possibility that "principles of background justice" may "indirectly bear" on the law governing "private contractual relations." Id, at 462-463.

[133] FRIED, *supra* n. 4, at 71. The immediate context is a discussion of a principle of "sharing," which Fried argues explains why, when a contract fails due to an accident for which neither party was more responsible, a court will sometimes split the loss between the parties. Fried asks why not extend this principle more broadly and require the government or neighbors to chip in?

[134] Id, at 71-72.

[135] Id, at 104.

destitute clientele."[136] "The merchant" is offering his "supposed 'victims' further options, enlarging their opportunities; if the alternatives seem harsh, that is a misfortune for which none of the parties is responsible."[137] Indeed, Fried argues it is unfair (Fried calls it “social fraud”) for society to encourage the store to provide “increased opportunities for the poor . . . on terms it will not honor.”[138] Fried also worries about the long-run consequence, if a merchant can only make a profit on these terms it will “cut losses and close up shop.”[139] Finally, Fried objects that it violates “liberal political morality” to use contract law as a mechanism for redistribution because liberal political morality requires redistribution “be pursued by the collectivity as a whole, funded by general contributions,” and not by imposing a burden “episodically on individuals as they come into contractual relations with poor people.”[140]

This misstates the trade-offs in limiting the power of a creditor to punish a debtor who defaults. Limiting a creditor's power to punish a defaulter is a mechanism for redistribution from creditors to debtors only if creditors are unaware of a limitation, or if creditors do not fully adjust price or other terms in response to a limitation. The redistribution is largely between people who need credit. While the doctrine of unconscionability is an unpredictable mechanism to limit the power to punish it does not pose much of a risk to creditors who impose harsh terms for reasons explained by Anne Fleming. The doctrine only helps a debtor who has a lawyer, the relief is limited (at best reversal of the transaction), and success requires finding a sympathetic judge. [141] A small adjustment in price can compensate a creditor for the uncertain but small legal risk created by the doctrine of unconscionability.

Fried briefly addresses the protection bankruptcy law provides defaulters after the discussion of *Williams v. Walker-Thomas Furniture Co*. He observes “[b]ankruptcy laws

---

[136] Id, at 105.

[137] Id, at 105.

[138] Id, at 106.

[139] Id, at 105.

[140] Id, at 106, 108.

[141] FLEMING, supra n. 45.

offer an apparent exception to this principle that redistribution should be a social burden, not one posed episodically on individuals as they come into contractual relations with particular poor people."[142] This way of thinking about bankruptcy laws ("with their system of exemptions and exclusions") may have made sense in early commercial England, when debts were between individuals and households.[143] Today, when almost all personal debt is intermediated through companies and financial institutions, society can rely on creditors to adjust price or other terms in response to bankruptcy laws and "their system of exemptions and exclusions." The tradeoff in limiting the power of a creditor to punish a debtor in default is largely between the interests of potential debtors in access to cheap credit and the interests of debtors who default or who pay under distress in suffering less pain.

Benson argues the result in *Williams v. Walker-Thomas* might be justified because the cross-collateral clause was an "unread and nonsalient provision" that "conflicts with the reasonable meaning of the salient primary terms and transaction-type of the individual purchases by the defendant."[144] This argument rests on the factual premise that people who bought items from Walker-Thomas understood the transaction to be an installment purchase of a single item, and not "a continuing, interlocking security for other transactions." [145] Benson presents no evidence for the claim that Walker-Thomas' customers did not understand what they were getting into it. While this claim is often made about the case it feeds on racial stereotypes so it should be treated warily.[146] And even if this was true in *Walker-Thomas* it is a mistake to assume that creditors generally try to hide

[142] FRIED, supra n. 4, at 108.

[143] In early commercial England there were debtors' prisons and bankruptcy laws did not serve the purpose described by Fried. One purpose of bankruptcy laws was to impose additional punishment, including capital punishment, on dishonest defaulters. Another purpose of bankruptcy laws was to address the collective action problem among multiple creditors. The rule discharging a debtor from his debts was included in bankruptcy law as a carrot to encourage debtors to participate in their financial dismemberment. Kadens, *supra* n. 1.

[144] BENSON, *supra* n. 4, at 238.

[145] Id.

[146] Dylan Penningroth, *Race in Contract Law*, 170 U. PA. L. REV. 1199, 1268-1270 (2021). Scholars who look closely at the case surmise that Walker-Thomas' customers were generally aware that nonpayment of debt could result in blanket repossession because this was a common occurrence in the community. Duncan Kennedy, *supra* n. 17, at 260-261.

punitive enforcement terms from debtors. It is in the creditor's interest to inform potential borrowers that default will be dealt with punitively because this deters adverse selection and shirking.

Understanding that punitive debt enforcement terms serve a deterrent purpose might appear to offer Benson a different argument for protecting defaulters based on the requirement of reasonableness that attaches to a contract. The argument does not depend on a debtor's ignorance of a punitive enforcement term. The argument would be that it is not reasonable for a creditor to punish a debtor when the purposes of punishment are not served because the debtor incurred the debt in good faith (reasonably believing he would be able to pay) and he was unable to pay because of bad luck. The duty of good faith often operates in just this way to prevent a party to a contract from exercising a power they have under the contract for a purpose other than the purpose the power was intended to serve.[147]

But this line of argument cannot justify much in the way of debtor protection because the agreed exchange sets the parameters of the requirement of reasonableness. Benson's principles allow a creditor to bargain for an unqualified power to punish default without inquiring into whether the reasons for punishment are present. For example, Apple now offers I-Phone users a buy-now-pay-later feature for any purchases they make with the Apple payment app. To deter adverse selection and shirking Apple could threaten to automatically cutoff a person's cellphone if they failed to pay the debt. Nothing in Benson's principles would prevent Apple and a customer from agreeing that cutoff would be automatic on default as part of the agreed exchange. The agreed exchange is the baseline.

Fried draws the line at the transaction in *Batsakis v. Demotsis*.[148] The defendant lent the plaintiff drachmae with an exchange rate of $50 in return for a promissory note for $2,000 plus interest. The plaintiff needed the money to feed herself and her children in Greece in the dark days of World War II. Fried argues the defendant cannot invoke the "conception of liberal individualism" to excuse himself from his "duty to be concerned about and to

---

[147] See Mark P. Gergen, *A Cautionary Tale About Contractual Good Faith in Texas*, 72 TEX. L. REV. 1235, 1266-1267 (1994)(collecting cases involving bad faith exercise of both limited-purpose and general-purpose powers).

[148] 226 S.W.2d 673 (Tex. Civ. App. 1949).

assist others." He explains the conception of liberal individualism operates "against the background of a functioning social system, which has the power and responsibility to distribute wealth and provide a social minimum." Fried recognizes that societies often fail to meet this responsibility. But he takes the striking position that even if a system fails to meet this responsibility, so long as the system is democratic, "then the responsibility of each citizen is to work politically for a greater measure of social justice," but they have no "duty to seek to remedy these systemic inequities on an individual basis and at the sacrifice of his private . . . advantage."[149]

This is a full-throated endorsement of the principle that in modern society under normal conditions a person may use contract law to exploit whatever advantage they have other people due to wealth or other sources of advantage. The morality demanded by contract law is no more than the morality of commercial exchange. On this view, creditors have both a legal and a moral right to demand and to enforce as harsh terms as the market allows.

4) INTERPERSONAL MORALITY

This Section draws on two papers by Seana Shiffrin that criticize the separation of contract law from norms of interpersonal morality. An influential 2007 paper, *The Divergence of Contract and Promise*,[150] criticizes contract law for giving less effect to promises than interpersonal morality requires. A 2023 paper, *Hidden Delegations*,[151] criticizes contract law for making debts freely assignable and ignoring the moral duties a creditor owes a debtor. The inability of Fried to see a moral justification for bankruptcy law in a norm of leniency is a striking example of what Shiffrin is warning about. Shiffrin proposes a way to guard against this, which is to link debtor protection laws to this norm. I will come back to this point after sketching Shiffrin's arguments.

---

[149] FRIED, *supra* n. 4, at 109.

[150] Shiffrin, *Divergence*, *supra* n. 11.

[151] Shiffrin, *Hidden Delegations*, *supra* n. 11, at 12-14.

a. Shiffrin's critique of the divergence of contract and interpersonal morality.

In *The Divergence of Contract and Promise,* Shiffrin argues contract law demands less of promisors with respect to keeping their promises than morality requires. The points of divergence include the mitigation requirement[152] and the failure to treat breach of contract as a wrong that warrants "punitive reactions . . . [including] proportionate expressions of reprobation, distrust, and self-inflicted reproofs, such as guilt."[153] This argument implicitly equates contract law with the rules governing the enforcement of a promise made in exchange for a promise. Contract law does not fall short of what Shiffrin claims the moral practice of promising in the case of personal debt. A creditor has no duty to mitigate when a debtor defaults.[154] People who fail to pay personal debts often encounter "expressions of reprobation, distrust, and self-inflicted reproofs, such as guilt." And personal debt is enforced punitively.

Shiffrin worries the laxity of contract law in enforcing promises could "corrode the habits and expectations associated" with the moral practice of promising.[155] Personal debt does not raise this worry. A story Shiffrin tells to show how the laxity of contract law may corrode the morality of promising illustrates. Here is the story:

> I have witnessed several conversations in which one party regarded another with incredulity for thinking that she was morally bound not to break her lease against her landlord's

---

[152] Id, at 710 ("[w]hen breach occurs, the legal doctrine of mitigation, unlike morality, places the burden on the promisee to make positive efforts to find alternative providers instead of presumptively locating that burden fully on the breaching promisor.")

[153] Id.

[154] This is formally true in England because the duty to mitigate does not apply to an action for an agreed sum. Mark P. Gergen, *Debt as a Contractual Type*, in Chen-Wisehart and Saprai, eds., RESEARCH HANDBOOK IN THE PHILOSOPHY OF CONTRACT LAW. This is true as a practical matter in the U.S. when a plaintiff is suing for compensation for a performance rendered before repudiation. Where English law and U.S. may differ is in how they handle a case where the defendant repudiates before the plaintiff performs. English law might change the conversation in Shiffrin's story about the tenant who is told she can break her lease, when the landlord can easily find a substitute renter, because U.S. law forces the landlord to mitigate damages. In England, if the landlord brings an action for an agreed sum, the landlord has no duty to mitigate and is entitled to a judgment for the rent.

[155] Shiffrin, *Divergence*, *supra* n. 11, at 740.

will for convenience, suggesting that it made her a "chump," a moral fetishist for feeling bound given that the landlord could readily (though unwillingly) find a substitute renter.

It would be a different conversation if the tenant was thinking about not paying rent while remaining in the apartment. The party who thought the tenant was being a chump, who I gather looks at the matter from the perspective of Holmes' bad man, would warn the tenant she is likely to face quick eviction and a judgment for legal fees in addition to the back-due rent. If the tenant has vacated and is thinking about not paying back-due rent, her friend would warn her that the landlord could easily get a judgment for the unpaid rent plus legal fees, and that the landlord might sell the judgment debt, leaving the tenant to deal with a faceless debt-collection company and (at best) endless harassing phone calls.

A broader worry and a larger goal of Shiffrin's 2007 paper is relevant to the law of debt. The broader worry concerns "law's assigning significantly different normative valences and expectations to practices that bear strong similarity to moral practices, especially if we expect both practices to occur frequently and often alongside each other."[156] The larger goal is to challenge the view that law and morality are best kept separate, and to "develop and advance an accommodationist approach that renders the norms of interpersonal morality relevant to the shape of the law, but in a distinctive way that draws on the perspective of moral agents as subjects of the law."[157] Shiffrin is not arguing contract law does not embody moral norms (by which I mean norms people may appropriately follow in their interactions with other people). Shiffrin is arguing the moral norms embodied by contract law might undermine norms that appropriately govern promise-making and promise-keeping in non-commercial interactions.

Some scholars criticize Shiffrin for trying to impose norms that govern promise-making and promise-keeping in non-commercial interactions on interactions that are appropriately governed by laxer norms. Thus, Dori Kimel criticizes Shiffrin for failing to recognize that the "legal practice of contract" is unlike the moral practice of promising in social and personal interactions because the latter "possesses the additional value that lies in its

[156] Id, at 741.

[157] Id.

potential contribution to personal relationships" while the former, "through the special sources of reassurance [the legal system] provides, alleviates the burden of personal trust which promises normally require to fulfill their instrumental function" which possesses the "intrinsic . . .value of personal detachment."[158] Of course, Kimel equates the "legal practice of contract" with interactions that are appropriately governed by the morality of commercial exchange.

Kimel's criticism is apt but only if it is limited to human interactions in which people's conduct is appropriately governed by the morality of commercial exchange. But contract law has a broader ambition—contract law aspires to cover all human interactions involving performance of services or transfers of property that are not a gift. People's conduct in some of these interactions (or some aspects of these interactions) is not appropriately governed by the morality of commercial exchange. There is a danger that people will infer law and morality demand no more of people than the morality of commercial exchange in all aspects of all interactions governed by contract law. This is precisely the trap Fried and Benson fall into. Drawing this inference in the case of the enforcement of personal debt would absolve creditors of any moral duties they owe debtors. I turn to Shiffrin's account of these moral duties in the 2023 paper.

b. The critique of assignability.

Shiffrin's immediate target in this paper is a contract law rule that makes debts freely assignable. She argues the rule of free assignability rule gives too little effect to moral duties a creditor owes a debtor by virtue of the creditor's power over a debtor. Debts are freely assignable because it is assumed that a debtor has no interest in who holds their debt because a creditor owes no duties to a debtor. Shiffrin challenges both assumptions. She explains a creditor holds numerous powers over a debtor that give a debtor an interest in who holds their debt.[159] These powers create vulnerability and so, according to Shiffrin, at least "arguably," generate a moral duty owed by the creditor to the debtor, if we grant the

---

[158] DORI KIMEL, FROM PROMISE TO CONTRACT (Hart 2001), at 78.

[159] Shiffrin, *Hidden Delegations*, supra n. 11, at 12-14.

claim "one always has at least a minimal duty to take care with respect to those who are significantly vulnerable to one."[160] Shiffrin continues:

> Supposing that claim were true, then the powers and rights of a creditor do not stand on their own. They should be re-described in conjunction with the creditor's duties to exercise them responsibly, with sensitivity toward the debtor's vulnerability. So, we might say that a lender advances money to a borrower and has a right to repayment in return. But, along with that right come responsibilities, such as to record the debt and the repayments accurately, to answer debtors' inquiries promptly and accurately, to protect confidential information, to consider whether the repayment schedule is realistic and reasonable, to consider requests for refinancing, restructuring, or forbearance in light of changed circumstances, to exercise sound and fair judgment in reporting lapses in repayment to credit agencies, to correct errors in recording and reporting where appropriate, to exercise reasonable judgment and patience, and to take only reasonable, humane measures in pursuing collection efforts.[161]

Shiffrin does not claim this interpersonal moral norm justifies changing the law on assignability on personal debt. Her argument for changing the law puts a great deal of weight on the claim that the financial crisis of 2008 "was substantially enabled, although not completely caused, by the legal power of assignment,"[162] and on the claim that "assignee creditors, i.e. debt buyers, may treat debtors less reasonably than would the original creditors."[163] Shiffrin acknowledges the concern that changing the law on assignability might reduce the availability and increase the cost of credit. In other words, she acknowledges that what the law should be on assignability is an all-things considered judgment that depends on contingent facts.

---

[160] Id, at 15.

[161] Id, at 15-16.

[162] Id., at 8. This claim is too broad. Debts have been assignable for hundreds of years. While the practices Shiffrin refers to depend on debt being assignable the pathologies are attributable to other factors, like financial innovations that created a demand for high-risk loans that could be used to create tranches of fixed-income securities with different risk profiles. It is debatable whether the costs of financial innovation (which include facilitating regulatory and tax arbitrage) outweigh the benefits in making it cheaper and easier for people to manage risk.

[163] Id, at 10.

Lawmakers should be cautious about radically changing the law on assignability of debt. The free assignability of debt is an old innovation that is deeply woven into modern credit and financial systems. It would be more productive to think of ways to exploit the existence of secondary markets for debt to craft incremental solutions to the problems posed by personal debt. For example, why not impose a modest tax on the sale of deeply personal discounted debt, pegged to the size of the discount, to create a fund to cover the cost of filing for bankruptcy, and then require creditors to inform debtors of this fund and the option of filing for bankruptcy? When a debt is resold, the seller could get a credit for any tax previously paid. This tax would kill several birds with one stone. It would help to solve the problem that some people who should file for bankruptcy do not do so because they cannot afford to. It would make assignment of high-risk debt slightly less attractive, marginally reducing whatever social evils are associated with this practice. And a creditor's payment to the fund would be correlated with the riskiness of the debt.

c. The moral duty to treat a debtor in default reasonably.

Perhaps it is debatable whether there is an interpersonal moral norm constraining a creditor's choice to assign a debt, which would warrant Shiffrin's caution in claiming such a norm exists. There should be no debate about the existence of an interpersonal moral norm requiring a creditor "to exercise reasonable judgment and patient, and to take only reasonable, humane measures in pursing collection efforts." This is a persistent and widely held moral belief about how creditors ought to treat debtors.[164]

In early commercial England, creditors were expected to forbear from pursuing debtors who could not pay because of bad luck and poverty.[165] People "considered the forgiving of debts to be as much an act of charity as a private bequest or payment of the poor rate. Neighborly charity not only involved lending to a neighbor in time of need . . . but also

[164] MARTHA MINOW, WHEN SHOULD LAW FORGIVE? (Norton, 2019), devotes a chapter to debt forgiveness as a case study of how the law can accommodate a norm of forgiveness.

[165] Canon lawyers debated about when leniency was required. Wim Decock, *Law, Religion, and Debt Relief: Balancing Above the 'Abyss of Despair' in Early Modern Canon Law and Theology*, 57 AM. J. OF LEGAL HISTORY 125 (2017).

forgiving debts which poor people could not repay."[166] As for debtors, "[d]eference was expected as the price of forgiveness."[167] In early commercial France, this norm was institutionalized by a system that placed the decision whether to punish a defaulter (beyond publicizing the default) in the hand of a public official. Punishment could be severe (including public torture or hanging), but punishment was reserved for defaulters who were found to have acted dishonestly, and public officials tended to err on the side of mercy.[168]

Debates over bankruptcy law from early commercial England to the present also reflect a widespread belief that a creditor ought to forgive a debtor who defaults for reasons beyond their control.[169] People who argue bankruptcy law is too lenient towards debtors do not question this premise. Instead, they argue the law protects undeserving debtors who incur debts dishonestly (or at least recklessly) or who use bankruptcy law to avoid debts they could pay.[170] People who defend bankruptcy law (or who argue the law should be more lenient than it is) argue that most debtors who seek the protection of bankruptcy (or who could seek protection if the law was more lenient) are deserving of protection because they incurred their debts honestly and were unable to pay due to bad luck.[171]

This interpersonal moral norm can be linked (Shiffrin uses the word "redescribe") to bankruptcy law and other debtor-protection laws. Linking debtor-protection law to this norm, and not (per Fried) to a policy to redistribute wealth from creditors to debtors, would

---

[166] MULDREW, *supra* n. 19, at 306.

[167] Id, at 309.

[168] HARDWICK, *supra* n. 19, at 175-176.

[169] Robert Weisberg, *Commercial Morality, the Merchant Character, and the History of Voidable Preference*, 39 STAN. L. REV. 3, 7-9 (1986).

[170] For example, the 2005 changes in bankruptcy were justified by claims the changes were "necessary to prevent abusive 'can pay" debtors from obtaining the easy discharge of their debts." Angela Littwin, *Adapting to BAPCPA*, 90 AM. BANKR. L.J. 183, 183 (2016). Not surprisingly, debates about "means testing" presented competing stories of debtors who Were able to pay exploiting bankruptcy law and debtors who were unable to pay being unprotected by bankruptcy law. Jack F. Williams, *Distrust: The Rhetoric and Reality of Means Testing*, 7 AMER. BANKR. INST. L. REV. 105 (1999). William C. Whitford, *A History of the Automobile Lender Provisions of BAPCPA*, 2007 U. ILL. L. REV. 143, explains many of the legislative choices reflected compromises between creditor groups because changes in the law altered the share of a debtor's assets or wages they would be able to capture in bankruptcy. But the public-facing arguments on these points were couched in terms of debtors' ability to pay. Id., at 182-183.

[171] SULLIVAN, WARREN, AND WESTBROOK, *supra* n. 67.

help to legitimate debtor-protection laws and to persuade creditors to comply with these laws. On Fried's account, complying with bankruptcy law is like paying taxes. On Shiffrin's account, debtor-protection law instructs creditors to do what they ought to do even if the law did not command it. Reasonable creditors who are inclined to do what morality commands without the law's instruction should welcome the law's instruction because it discourages other creditors, who are not inclined to be reasonable, from exploiting their reasonableness to grab a larger share of what a debtor is able to pay. This linkage also reduces the onus on debtors in filing for bankruptcy when they deserve leniency. By filing for bankruptcy, a debtor is doing what the law tells them to do to assist creditors to treat them reasonably, which is something a creditor ought to want to do anyway.

This interpersonal moral norm does not provide guidance for designing debtor-protection laws.[172] The problem is not the generality or vagueness of the norm. The command to creditors "to exercise reasonable judgment and patience, and to take only reasonable, humane measures in pursing collection efforts" is reasonably clear. But this command does not translate into an administrable legal rule. The rule's application depends on facts about a debtor's honesty and ability to pay that are difficult for a creditor and a court to ascertain. Clear rules are necessary because creditors often perceive debt collection as a contest with other creditors "to convince existing debtors to pay *you* over others, *before* paying others, for as small an outlay as possible."[173] Inevitably, some creditors will focus on the financial payoff in this contest with other creditors (and not the pain inflicted on a debtor), so a vague standard will encourage aggressive collection efforts unless severe sanctions are imposed. For practical reasons, debtor-protection laws must take the form of

[172] This point is not the same as Richard Craswell's argument that philosophical theories that "ground the enforceability of promises on considerations of individual freedom and autonomy, or on the principle of fidelity to one's prior statements or commitments," do not provide a guide for setting background rules that "fill out the details of what it is a person must remain faithful to," or that define the baseline obligation that people are free to alter. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 490 (1989).

[173] DEVILLE, *supra* n. 71, at 117.

clear rules that define protected debtors, protected assets, and prohibited collection techniques.

The design of debtor-protection laws requires balancing peoples' interest in access to affordable credit with the interests of debtors who default or who pay in distress in avoiding pain. Economics is well-suited to solving this type of problem because it provides sophisticated methods for estimating the effects of a change in the law on human behavior and plausible methods for comparing positive and negative effects. But economics also generally indicates that it is best to leave problems like this to the market to solve in the absence of identifiable market imperfections. The answer "leave-it-to-the-market" is almost inevitable if one assumes the goal is to increase wealth or to satisfy people's ex ante preferences. We end up back at the status quo while tying debtor-protection laws to a norm of interpersonal morality that requires a creditor "to exercise reasonable judgment and patience, and to take only reasonable, humane measures in pursing collection efforts." The next section considers liberal contract theory, which demands more both as a regulatory and a moral matter.

5) Liberal Contract Theory

This section addresses what liberal contract theory has to say about punitive debt enforcement. The theory makes a vertical demand on lawmakers to design legal rules to enhance people's autonomy and a horizontal demand on people to treat each other as substantive equals.[174] On the regulatory (vertical) side, liberal contract requires lawmakers do an autonomy accounting in deciding how to regulate personal debt enforcement. I explain this justifies putting a thumb on the scale of economic analysis in favor of reducing pain inflicted on debtors in default or who pay in distress, and that the thumb's weight depends on whether the benefit of inflicting pain is to increase the availability or to reduce the cost of credit. On the moral (horizontal) side, the demand people treat each other as substantive equals (aka the requirement of relational justice) would have profound effects

[174] Dagan & Gergen, *supra* n. 13.

on personal debt enforcement. The required changes are so great that it casts doubt on whether relational justice is a cognizable legal norm in this area of law currently.

a. Autonomy accounting.

The strand of liberal contract theory that demands lawmakers design legal rules to enhance autonomy is instrumental in nature, like utilitarian or efficiency theories of the law. The difference is that law is used as an instrument to enhance human autonomy rather than human welfare or wealth. Law generally enhances human autonomy by providing people a range of attractive legal choices in important areas of human interaction,[175] and by establishing legal formalities (e.g. notice requirements) to ensure people understand the ramifications of important choices they make.[176] Law does not have to do much in these respects when it comes to personal debt enforcement because credit providers are adept at creating new legal and physical mechanisms for enforcing personal debts. And, unlike price terms, creditors generally want debtors to understand punitive enforcement mechanisms so the mechanisms can perform their function, which is to deter people from borrowing when they do not expect to be able to repay, and to coerce people to repay when this involves a significant personal sacrifice.

Lawmakers should focus their attention on monitoring and regulating debt-enforcement mechanisms created by credit providers. Lawmakers should engage in something like cost-benefit analysis in evaluating punitive debt enforcement but weighing autonomy-related costs and benefits. The autonomy-related costs are borne by people who default or who pay in distress, for they bear the brunt of punitive debt enforcement. Liberal contract requires that lawmakers assign weight to the "possible detrimental implications" of the law "for the autonomy of *the parties' future selves*" in evaluating legal rules.[177] The autonomy-related benefits of punitive debt enforcement are increasing the availability and

---

[175] DAGAN & HELLER, *supra* n. 8, at 4.

[176] Dagan & Gergen, *supra* n. 13.

[177] Hanoch Dagan & Michael Heller, *Freedom, Choice, and Contracts*, 20 THEORETICAL INQUIRIES L. 595 (2019).

reducing the cost of credit. These two types benefits have different weights in autonomy accounting. I will come back to this point.

Setting this difference to the side, autonomy analysis of a debt enforcement mechanism is like ex post economic analysis. To illustrate I will use a recent paper by Gertler, Green, and Wolfram evaluating digital collateral.[178] This involves a creditor embedding digital lockout technology in a consumer durable securing a loan. The asset is disabled when the debtor misses a payment and enabled when the debtor resumes payments. Since many consumer durables have digital components in which lockout technology can be embedded this enforcement mechanism has widespread potential application. It is attractive to creditors because enforcement does not require legal action or physical repossession of an asset. It is likely in the not-too-distant future most small, high-risk loans will be collateralized by people's cell phones and other electronic devices.

The paper reports the result of a field experiment in Uganda of small-scale loans offered by Fenix International, a solar-home-system provider in Africa. Fenix sells small solar systems to customers who do not have alternative sources of electrical power on a PAYGO basis. A small system can power lamps, a radio, and charge cell phones. The system is automatically disabled if a customer fails to make a daily or weekly payment. The system is enabled when a customer resumes payment. The repayment amount and schedule are set so a customer can fully pay off the purchase money loan (without any additional interest) by making frequent but intermittent payments over a set payment period and an additional grace period (i.e., there is a flexible repayment schedule). After the initial period and the grace period additional interest is charged. Most customers take advantage of this flexibility to skip some payments at the cost of having their solar system temporarily disabled. Some customers never pay the loan but can reactivate their system for a short period at any time by making the stipulated daily (or weekly) payment.

Fenix offers additional refinancing loans on similar terms to customers who have paid off their purchase money loans and subsequent refinancing loans on time. The field study

[178] Paul Gertler, Brett Green, & Catherine Wolfram, *Digital Collateral*, 139 QUARTERLY JOURNAL OF ECONOMICS 1713 (2024).

involved refinancing loans that were timed to the start of the school term when people need money to pay school fees and expenses for elementary and secondary schools.[179] The study separated people into three groups: people offered secured loans, people offered unsecured loans, and people offered secured loans who were told after they borrowed they were unsecured (these "surprise unsecured" loans were to estimate adverse selection).[180]

Digital collateral significantly increased loan repayment, making loans profitable that otherwise would not be.[181] The authors estimate around two-thirds of the increase was from reducing shirking (i.e., debtors choosing not to pay though they could) and one-third is from reducing adverse selection (i.e., debtors incurring debts they expect not to be able to pay).[182] There were also high loan take-up rates, 12% of customers contacted about a loan expressed interest and of these households 45% took the secured loan while 51% took the unsecured loan.[183]

Economic analysis might stop there for sometimes it measures welfare by preference satisfaction and treating willingness to pay to indicate preferences. Some analysts will conclude the refinancing loans are welfare-enhancing because consumers are willing to pay the price (including losing use of their solar-home-system). Gertler, Green, and Wolfram go further using survey data. They find that 9 out of 10 debtors used the loan to pay school expenses or to offset income that a child would have earned had the child not attended school; that loan-taking was correlated with significant increases in school

[179] The loan amount was 300,000 Ugandan Shilling (UGX) (around $81) but a debtor was required to prepay one quarter of this amount in what was called a deposit. A debtor was required to repay the loan over 100 days, paying 3,000 UGX daily. After an initial seven-day grace period the system was disabled if a debtor failed to make a daily payment. The system was enabled when payment resumed. A loan was considered paid on time if 300,000 UXG was paid within 145 days of the issue date. There was an additional 45-day grace period before additional interest of 2% per month was charged on the balance. A debtor would be declared in default and a system replaced after 180 days of no payment. Id, at 1732-1733.

[180] Id, at 1741-17422.

[181] Id, at 1716, 1742-1743.

[182] Id, at 1716, 1734-1735.

[183] Id, at 1735. Households offered unsecured loans had good reasons to decline the loan if they did not need the money at the time, or did not think they could repay the loan, because there was a high implicit interest rate and failure to repay on time would cut off future loans from Fenix.

enrollment and attendance compared to a control group of households that were not offered loans; and that loan-takers did not have access to other sources of credit. [184]

Liberal contract requires lawmakers to weigh the “detrimental impacts” of digital collateral on the ex-post autonomy interests of defaulters and debtors who pay in distress. It is possible to say in a general way what this inquiry would involve in the Fenix field study. Approximately one-third of people with secured loans never paid off the loans.[185] For this group of people, the autonomy-related harms involve not owning a solar system outright but instead having the option to rent the system on a short-term basis. Approximately one-third of people eventually paid off the loan but with a significant number of lockout days. For this group of people, the autonomy-related harms involve the loss of solar power on lockout days. For both groups, the autonomy-related harms include the negative psychological impact of having to budget and plan around when to pay for solar power.

Systematizing this inquiry requires answering difficult questions.[186] What constitutes autonomy-related harms? Once identified how should these harms be measured or weighted? And how should ex-post autonomy-related harms to debtors who default or who pay in distress be balanced against ex-post autonomy-related benefits to people who are able to obtain credit because of digital collateral?

Ex post analysis of the welfare effects of digital collateral has some bearing on the answers to these questions because welfare and autonomy interests are entangled. Gertler, Green, and Wolfram use surveys to collect several types of information that could provide insight on the impact of digital collateral on the ex-post welfare of debtors. One type of information is the contingent price survey respondents reported they would be willing to

---

[184] Id, at 1748-1751.

[185] Id, at 1740 (Figure 4(c)) and 1741-1742.

[186] Hanoch Dagan & Roy Kreitner, *Economic Analysis in Law*, 38 Yale J. of Reg. 566, 587 (2021), describe the problem as devising "commensurability-proxies for . . . autonomy" that permits aggregation across individuals.

pay to unlock the solar system for a day.[187] They collected this information to test the effect of the contingent price on loan uptake and found what one would predict (people with a higher contingent price were less likely to take the secured loan). This information could also be used to estimate the harm to a household of being locked out.

The other type of information is responses to a survey conducted six months after the field study was initiated. One set of questions concerned a household's balance sheet at the end of the six-month period.[188] The other set of questions concerned a household's experiences during the six-month period. The experiential questions covered whether a household had problems with money (e.g., could not pay for necessities), suffered financial shocks (e.g., job loss), or encountered non-financial adversity (e.g., problems with alcoholism).[189] Gertler, Green, and Wolfram aggregate and compare a baseline group of people who were not offered the loan with loan-takers, secured-loan-takers, surprise-unsecured-loan takers, and unsecured-loan-takers as groups and find no material differences in welfare outcomes across these groups.[190]

Survey information like this could be used to compare welfare outcomes within the group of secured-loan-takers based on their repayment history. People who struggled to pay the loan, or who failed to pay the loan, may have had worse balance sheet and experiential outcomes. The injunction lawmakers consider the impact of digital collateral on the autonomy of the "future selves" of debtors who default or pay in distress requires lawmakers to assign additional weight to strong negative outcomes in this group.

Some looseness should be allowed in assessing autonomy-related consequences to avoid the fallacy of only counting what is countable. If there are material autonomy-related harms that are not roughly offset by autonomy-related benefits, then lawmakers would place a thumb on the scale of economic analysis in favor of reducing pain inflicted on

[187] Gertler, Green, and Wolfram, *supra* n. 178, at 1745-1746. They divide responses into three groups (0-1,000 UGX, 1,000-3,000 UGX, and 4,000-5,000 UGX) to analyze the effect of willingness to pay on uptake.

[188] Id, at 1751-1753.

[189] Id, at 1753-1755.

[190] Id, at 1760.

debtors who default or who pay in distress. A loose estimate of the weight of the net autonomy-related harm not captured by economic analysis would determine the thumb's weight. A loose description of the character of the autonomy-related harms might also help to tailor rules to protect debtors to reduce ex post autonomy-related harms (and ex post harms to welfare) while minimizing the cost. For example, if surveys show significant harms associated with people experiencing intermittent lock-out days, then lawmakers could require people be given a few additional grace days.

Fenix's refinancing loans should pass such as appraisal because it makes credit available in a society where credit otherwise would not be available.[191] Households that were able to pay-off the loan qualified for future loans at better terms in addition to obtaining education for their children. This can be life-changing for people who would not otherwise have any access to credit.

On the other hand, a similar program in the U.S. using people's cellphones as digital collateral for consumer loans might fail such an appraisal even though it might be commercially viable (and therefore pass muster if the criterion was improving welfare based on ex ante preferences reflected by willingness to pay). This is because people have other sources of credit so the principal effect of digital collateral is likely to be to reduce the cost of debt. People will reap a small individual financial benefit that will be large in the aggregate. Individually small financial benefits count for less in autonomy analysis than in economic analysis because paying a few dollars less for a loan does not have a life changing effect on people, while losing use of their cellphone (or laptop or car) might. Thus, a heavier thumb should be put on the scale in favor of reducing the pain inflicted by debt enforcement when the offsetting benefit is an individually small financial benefit.

b. Relational justice.

The requirement that people treat each other as substantive equals (aka relational justice) has much more profound implications for personal debt enforcement. The changes required are so great they cast doubt on whether relational justice is a cognizable legal

[191] Id, at 1714.

norm in this area of law currently. Dagan and Dorfman flesh this requirement out in *Poverty and Private Law*, so I begin there.[192] They argue people must "interact with others in terms that reflect respect for one another's self-determination and substantive equality."[193] This includes a duty to make some accommodations for another person's poverty in contractual interactions. Thus, Dagan and Dorfman argue large universities, real estate developers, and lawyers should have a legal duty to provide "affordable education, housing, and legal services" to poor people.[194]

A duty to accommodate poverty goes against a strong libertarian grain in private law epitomized by the absence of a duty to rescue. Dagan and Dorfman use two general strategies to try to make a duty to accommodate poverty legally cognizable. First, they define private law expansively to include all laws that regulate private interactions. This enables them to include in private law regulatory laws that require businesses to make accommodations for disabled people. Dagan and Dorfman leverage this move by drawing a connection between accommodating disability and accommodating poverty. Like disability, poverty is debilitating and often a matter of bad luck. Why should the law recognize a duty to accommodate one and not the other?[195]

Their other strategy is to identify countervailing reasons to explain away cases in which the law demands less of people than relational justice requires. They explain well-to-do people do not have a legal duty to help homeless people they encounter in public places because of a coordination problem, specifically the difficulty of devising a scheme that distributes benefits and burdens fairly across homeless people and well-to-do by-passers.[196] They identify a handful of limiting reasons to cover voluntary interactions between well-to-do people and poor people, including contractual interactions. Two limiting reasons are general: the burden imposed on people "must be consistent with [their] self-determination

---

[192] Dagan & Dorfman, *Poverty*, *supra* n. 12.

[193] Id, at 231.

[194] Id, at 246-248.

[195] Id, at 232-235, 238-239.

[196] Id, at 243.

and equal standing";[197] and a legal rule must satisfy the basic requirements of a rule of law (e.g., a rule must be clear and capable of being consistently applied).[198] Other limiting reasons describe necessary circumstances for a rule of accommodation to work. One necessary circumstance is "discreteness," meaning that a well-to-do person must be able to identify a poor person and the accommodation must be in a form that does not embarrass the beneficiary.[199] Another necessary circumstance is the absence of "hybridity," meaning a good or service a well-to-person supplies to a poor person in a transaction must be a basic good and not a luxury good.[200]

The argument large universities, real estate developers, and lawyers should have a legal duty to provide "affordable education, housing, and legal services"[201] to poor people follows in a straightforward way if one accepts these principles. It is hard to explain why there is a duty to accommodate disability and not a duty to accommodate poverty. The duty is kept from being overly burdensome by limiting it to persons who serve a sufficiently large number of people that reducing price to accommodate poor people does not unduly impair their operation. The necessary circumstances of discreteness and the absence of hybridity are present in the cases of education, housing, and legal services.

No U.S. law requires private schools and lawyers to provide free or reduced-rate services to poor people. But these are well-established practices so Dagan and Dorfman would be on strong ground if they argued this was a broadly recognized moral duty, and they could even argue this moral duty rises to the level of "soft law" because it is institutionalized in rules of professional responsibility and the like.[202] If they focused on the U.S., Dagan and Dorfman could add health care to this list. U.S. law requires federally-

---

[197] Id, at 241.

[198] Id, at 242.

[199] Id.

[200] Id, at 243-244. They identify a third necessary circumstance, the absence of "fungability," meaning the beneficiary cannot resell the good or service. Id, at 25. Why this is necessary circumstance is unclear. Poor people need money as well as basic goods. Perhaps the concern is the inefficiency when poor people resell basic goods to obtain money.

[201] Id, at 246-248.

[202] Model Rules of Professional Conduct Rule 6.1 takes the position there is a "responsibility" to provide pro bono legal services but does not describe this as a duty.

funded hospitals to provide free care to poor people.[203] And there are laws regulating the collection of medical debts. For example, Colorado law limits what a hospital can collect to a percentage of a patient's income and requires that a debt be forgiven after three years.[204]

Dagan and Dorfman do not address debt enforcement. This is easy case for them normatively because one way to accommodate a person's lack of means in providing basic goods is to provide a good on credit and then forgive the debt if they cannot pay. It is a hard case for them legally because U.S. law falls far short of what relational justice requires in circumstances that cannot be explained by their countervailing reasons. In a society that complied with the requirement of relational justice a landlord could not evict a poor tenant who was unable to pay rent because of bad luck when leniency would not impose a significant cost on the landlord. And a landlord could not evict a tenant who was unable to pay because of bad luck by dumping their possessions on the street. This is commonplace in some U.S. cities.[205]

The norm of relational justice has more far-reaching implications for personal debt enforcement.[206] Relational justice would preclude a creditor from imposing debilitating punishment on a debtor without first determining punishment is warranted (i.e., the debtor incurred the debt dishonestly or the debtor is shirking) so long this can be determined with reasonable accuracy and without an undue burden. In other words, relational justice would require something like due process by creditors in punitive debt enforcement. Relational justice might also require leniency (Hagan and Dorfman would say accommodation) when an action would be debilitating to a debtor even when an action is not punitive. For

[203] A 1946 law requiring free-care by federally subsidized hospitals is popularly known as the Hill-Burton Act, Pub.L. 79-725. For an assessment how this turned out at the quarter-century mark, see Marilyn G. Rose, *Federal Regulation of Services to the Poor Under the Hill-Burton Act*, 70 NW U. L. REV. 168 (1975). A 1986 federal law requires hospitals that receive Medicare funding to provide emergency room treatment to patients without regard to their ability to pay. Pub. Law. 99-272 § 9121.

[204] Roberston, et al, New State Consumer Protections Against Medical Debt, JAMA, 327:2, 121-122 (2022). A federal law only applies to nonprofit hospitals and is easy to evade.

[205] DESMOND, *supra* n. 66.

[206] Dagan and Dorfman take the position that the requirement of relational justice may trump efficiency concerns. They argue that a minimum wage and a warranty of habitability may be justified by the requirement of relational justice even though they are inefficient and poor mechanisms for achieving distributive justice. Dagan and Dorfman, *Poverty*, supra n. 11, at 33-37.

example, a large landlord might have a duty to forebear evicting a tenant who could not pay full rent even though the landlord could immediately rent the property to a tenant who would pay full rent.

Dagan and Dorfman pursue an odd strategy to make the norm seem legally cognizable. They cite legal rules that can be explained by other moral norms or by values like efficiency. For example, they claim the duty of good faith, the duty to mitigate damages, and the rule on substantial performance flow from the norm of relational justice.[207] But Benson shows these rules also flow from the morality of commercial exchange, which only requires people honor their bargains.[208] And these rules can be explained by the value of efficiency.[209] That these rules flow from multiple moral norms, and can be explained by the value of efficiency, increases confidence they are good rules, but it undercuts claims that the rules establish a particular legal norm, or that they establish the priority of the value of efficiency in contract law.

The norm of leniency (and Shiffrin's broader norm requiring a creditor to treat a debtor reasonably) could be tied to the norm of relational justice, but this may involve a subtle change in the character of the norm. In times past, the relationship between a creditor and a debtor whose debt was forgiven was thought of in hierarchical terms. Creditors were people at the top of society who had a duty to care for people at the bottom. Being at the bottom of society, people whose debts were forgiven owed their creditor a duty of social deference.[210] The same may be said about many other relationships where Dagan and Dorfman claim relational justice requires accommodating poverty. In times past, the relationship between a professional and an individual served as matter of charity would have been explained in hierarchical terms. People, like doctors, lawyers, and teachers who were at the top of society had a duty to care for people at the bottom, and people at the bottom who were cared for without charge (or reduced charge) owed a duty of social

---

[207] DAGAN & DORFMAN, *supra* n. 11, at 210-238.

[208] BENSON, *supra* n. 4, at 157.

[209] In *Market Street Assoc. v. Frey*, 941 F.2d 588 (7th Cir. 1991), Posner, J., explains the doctrine in economic terms.

[210] MULDREW, *supra* n. 19, at 306.

deference. The same would have been said of people who provided shelter to people in need of shelter.

Hierarchy is one of several general categories social theorists use to describe the ways people think about how they may appropriately treat each other in economic interactions. David Graeber describes the other two general categories as "communism" and "exchange."[211] He uses the word communism to describe "any human relationship that operates on a principle of 'from each according to their abilities, to each according to their needs," while noting "a more neutral term like 'solidarity', 'mutual aid', 'conviviality' or even 'help'" gets at the same way of thinking. A hallmark of "communistic relations" is that "taking accounts is considered morally offensive or just bizarre."[212] This distinguishes communistic relations from exchange relations (which can involve reciprocal gift-giving as well as bargain-exchange), which are all about equivalence.[213]

When wealthy people comply with legal rules and customs that require them to make accommodations for poverty they might think about the interaction in hierarchical terms, like they think about paying taxes or about other gestures society demands of wealthy people to placate the masses.[214] Creditors might think the same way when they forebear in enforcing debts. Or wealthy people might think about these interactions in communistic terms, like good people think about how they should treat their spouses, siblings, and friends, and like good people think about how they should treat other people in the "immediate wake of great disasters."[215]

Relational justice describes another way people might think about these interactions. This way of thinking about an interaction is not hierarchical. It combines aspects of exchange—people treat others as equals and respect for self-determination is understood to be reciprocal—with aspects of "mutual aid"—wealthy people are expected to make

---

[211] David Graeber, *On the Moral Grounds of Economic Relations: A Maussian Approach*, 14 JOURNAL OF CLASSICAL SOCIOLOGY 65 (2014).

[212] Id., at 70.

[213] Id., at 70-72.

[214] Id., at 74 (discussing "hierarchical redistribution").

[215] Id., at 68.

accommodations for the poor because they can do so without an undue sacrifice, and it would be considered offensive to “keep accounts.” The proponents of relational justice make a persuasive case people might think this way about accommodating poverty, and that it would be a better world if people did think this way. But they do not make a persuasive case people do think this way currently.

6) CONCLUDING REMARKS

This article has examined what contemporary moral theories of contract have to say about problems associated with punitive enforcement of personal debt. Theories like those of Charles Fried and Peter Benson that try to justify contract law inevitably take the position these problems are outside the scope of contract law and contract theory. They must take this position because contract law (as the field is conventionally defined) embodies the morality of commercial exchange. This morality allows creditors to bargain for as harsh enforcement terms as the market allows, and to enforce harsh terms without regard to the pain inflicted on debtors who default or who pay in distress. Critical and reconstructive theories of contract law do better. Shiffrin’s warning of the dangers of separating contract law from norms of interpersonal morality is spot in the case of punitive enforcement of personal debt. Bankruptcy law and other creditor protections could be strengthened by being linked to an interpersonal moral norm requiring a creditor to use reasonable care in enforcing a debt by virtue of a creditor’s power over a debtor.

Liberal contract theory directs lawmakers to do autonomy accounting in assessing punitive debt enforcement, which justifies putting a thumb scale in economic analysis in favor of reducing pain inflicted on debtors who default or who pay in distress. The thumb’s weight depends on whether the benefit of inflicting pain is to increase the availability credit or reduce the cost of credit. Liberal contract theory also requires people treat others as substantive equals. This requirement of relational justice would have profound implications for punitive debt enforcement. The required changes are so great they cast doubt on whether relational justice is a cognizable legal norm in this area of law currently. But this is not a reason to reject the norm. Contract law’s morality is to some extent a social construct, like contract law. If contract law can be reconstructed along genuinely liberal lines, then at some time in the future there will be a robust set of rules tempering the power of creditors to punish people who default that are understood as aspects of a general requirement that people treat each other as substantive equals even in contractual interactions. Broadening contract theory to include debtor protection law and linking the leniency norm to the norm of relational justice, are small steps in this direction.