

## Introduction

### CHOICE THEORY

As free people, we do not live each on our own island, isolated in perfect independence. We want and need each other to achieve life's worthy goals. Contract law provides a powerful means to achieve these goals. Through contract, we can recruit others to help write the stories of our lives.

There's a catch, however. Contracts require enforcement; enforcement entails coercion; and coercion seems at odds with freedom. So, is "freedom of contract" possible? Yes, the state can respect, indeed enhance, our autonomy even when it enforces our contracts. However, the truth of this proposition is not self-evident. The aim of this book is to show how a robust commitment to freedom justifies and shapes contract law in a liberal polity.

We start from the mainstream liberal tradition of the past century, that is, with concern for individual autonomy – with self-determination, with self-authorship, with ensuring to us, as individuals, the ability to write and re-write the story of our own lives. This deep and widely-shared sense of what it means to be free – the liberalism of Isaiah Berlin, H.L.A. Hart, and John Rawls – rightly dominates the most important political, legal, and philosophical debates.

Surprisingly, however, this approach has gone missing in recent generations of work on private law in general and contract law specifically. Other notions of contractual autonomy – say Kantian and libertarian ideas of personal independence – now have a powerful hold on the field. But they all necessarily fail for reasons we detail in Chapters 1 through 3. Similarly, foundational alternatives for liberalism itself, such as political liberalism, are not adequate to justify contract law, as we explain in Chapter 8, where we answer many objections to our theory.

We call our approach the *choice theory* of contract. In this view, the state enforces contracts not just to make society as a whole better off – that's the

efficiency rationale – but even more fundamentally to enhance people’s autonomy so that they can make their lives meaningfully their own. Much of our task is to persuade you that any contract theory worthy of being called liberal must concern itself with autonomy defined in this sense, as self-determination.

Choice theory answers the most important questions of contract theory: What is the “freedom” celebrated in “freedom of contract”? How are individuals freer when the state coerces contract performance? What core values should contract law advance and how do those values inter-relate? Must the state take an active role in shaping contract law? If so, what is that role?

Existing approaches have failed to answer these fundamental questions. One observer goes so far as to say that “today there is no generally recognized theory of contract. The effort to develop a coherent explanation of contract seems to have reached an impasse.”<sup>1</sup> There is no impasse. A doctrinally well-fit, conceptually coherent, and normatively attractive account of contract is in view. Choice theory starts with the most appealing, least controversial tenets of modern liberalism and ends with their implications for contract law.

#### FREEDOM OF CONTRACTS

The main tool that choice theory uses to point the way forward is an organizing framework we call “freedom of contracts.” We would like to claim the ubiquitous phrase “freedom of contract” – without the “s” – but we leave the term aside because of its confounding negative liberty and *laissez faire* associations.

“Freedom of contracts” sums up the three irreducible elements necessary to contractual autonomy: (1) an overarching voluntariness principle, sometimes called freedom *from* contract; (2) the familiar freedom to bargain for terms *within* a contract; and (3) the long-neglected freedom to choose from *among* contract types. As we will show, attention to the third element – choice among types – is the key that can set contract theory on a sustainably liberal path.

We agree that the first element, voluntariness, is an essential aspect of free contracting, with a twist we’ll get to in Chapter 8. Also, we acknowledge that the second component, bargaining for terms within a contract, is a nontrivial aspect of contracting. It’s the overwhelming focus of current theory. At times, people really do want their own idiosyncratic deal and they need the law to do no more than enforce their joint agreement.

But bargaining for terms is not the dominant mode of contracting, and it should not determine, as it long has, the central meaning of contractual autonomy. Usually, when people voluntarily enter contracts, they are not designing their deal from scratch. For most of us, most of the time – if we get married, start a new job, or click “I accept” – contractual freedom means

the ability to choose from among a sufficient range of off-the-shelf, normatively attractive contract types and then, perhaps, make a few contextual adjustments within the deal. In large measure, freedom means pursuing the valuable ends of our lives, not spending our resources dickering over contract terms and worrying whether others are taking advantage of us.

In other words, the mainstay of present-day contracting is the choice among types. By “types,” we do not mean standard-form contracts or boilerplate terms as such. Forms or terms may reflect the parties’ choice of a particular type (say, a franchise agreement); they may push a type in a certain direction (say, a landlord-provided lease), or they may point toward emergence of a new type (such as a cohabitation agreement). But standard forms and terms are not themselves types. They are particular instances of the types of relationships people contractually create, whether franchise or agency, commercial or residential lease, cohabitation or marriage.

Each type uses distinctive doctrinal features embedded in the law – not just in form contracts or boilerplate terms – to embody that type’s particular normative concerns and stabilize its shared cultural meaning. To give just a few examples, consider doctrines such as waiting periods to dissolve marriage contracts, limitations on enforcement of employee noncompete agreements, and generous return rules in consumer transactions. From the perspective of most contract theory today – focused on freedom to bargain for terms inside a contract – such doctrinal rules may seem to be exceptions from a general norm, oddities needing rationalization, or even worse, they may be framed simply as limits on contractual freedom to be discarded.

By contrast, choice theory suggests that each of these doctrines, and many others, may be better understood as clues to and reflections of the divergent normative concerns of a particular contract type. By stabilizing their respective types, by making them more available and attractive to contracting parties, and by making available distinct choices about the structure of important relationships, such doctrinal rules can enhance contractual freedom.

Attention to the actually existing choice among types opens the door to a *liberal* and *general* theory of contract law. Let’s introduce those three components in turn.

#### A LIBERAL THEORY

To qualify as liberal, contract theory must be grounded in an appealing conception of contractual “autonomy” – or “freedom” or “liberty” (we use these terms interchangeably for reasons that will become apparent by the end of Chapter 4). The problem is that contractual autonomy is not self-defining.

Just the opposite. Pinning it down is tough, much tougher than the concept's easy intuitive appeal suggests.<sup>2</sup>

1. *Autonomy through Choice.* The first theoretical aspiration of choice theory is to offer a liberal conception of contractual autonomy grounded in, and well-adapted to, the actual diversity of contract types. One element of this autonomy – reflecting the usual meaning of freedom of contract – involves supporting individuals as they pursue their own idiosyncratic deals. But contract law must do more if it is to expand meaningful choices in service of autonomy. It must also support freedom to choose from among diverse, normatively attractive contract types in each important area of human interaction. Free people are defined in part by the attractive choices they reject, not just those they select.

The implications of this claim are stark. It is here that choice theory offers its single most important and distinctive normative payoff: a state committed to human freedom must be proactive in shaping contract law, including ensuring availability of a diverse body of normatively attractive types. This commitment means that the state is sometimes obligated to support establishment of emerging types that serve minoritarian or utopian values – even when market demand for the new types is low. This support can take the form of enforcing novel contract types (say, judicially created cohabitation doctrines or privately drafted commercial surrogacy contracts) or removing legislative and regulatory hurdles to emerging contract types (such as Canada's “dependent contractors”). We illustrate this process in Chapter 11, and then, in Chapter 12, we explore some countervailing limits to expanding choice – based on cognitive, behavioral, structural, and political economy grounds and in response to concerns about comparative institutional competence.

2. *Mandatory Rules and Autonomy.* As a corollary to supporting new types, sometimes the state must also *restrict* choice within types. By stabilizing and channeling cultural expectations regarding types, such restrictions may be necessary to make them effective. This last point suggests a surprising payoff of choice theory: sticky defaults and even mandatory terms within a contract type can actually increase freedom, so long as – and this is crucial – law offers sufficient choice among types, a claim we justify and refine in Chapter 10.

#### A GENERAL THEORY

The second conceptual component of choice theory is to show how a liberal contract theory can also be a *general* one. To qualify as general, a theory must address the varied goods and diverse spheres of contracting.

1. *Intra-Sphere Multiplicity*. Accordingly, we reject the notion that any single value – utility, community, or even autonomy – suffices for a coherent general theory. Instead, we relocate most of the normative (and doctrinal) discussion to a more correct and productive level – relating to the diverse values that animate each type and the recurring dilemmas common to each sphere. For now, it suffices to note that by “sphere,” we mean a core realm of human interaction in which contract law can enrich how individuals legitimately enlist others to their projects. The particular taxonomy of spheres we develop in Chapter 9 is wholly instrumental to this end of ensuring adequate choice among types. (Chapter 10 pins down “types,” including how we know when a new “type” has emerged and when the range of types is “adequate.”)

It should be no surprise that the values plausibly animating marriage, employment, and consumer transactions differ from each other and from those driving commercial transactions, and further that, the contract types within a single sphere offer individuals choices among divergent values. Indeed, the core requirement of choice theory is the availability of normatively attractive types with distinct value mixes that can serve as effective substitutes within each sphere – what we call *intra-sphere multiplicity*.

2. *Freedom for Economists*. One collateral benefit of this approach – and a major impetus for this book – is to offer efficiency-oriented contract scholars a more secure and defensible normative grounding for their work. Much of contract law is, and should be, driven by efficiency concerns. But a thoroughgoing efficiency theory of contract has never been persuasive. Autonomy and community concerns cannot be banished altogether if, for example, you oppose slavery and endorse marriage. So, how do these normative commitments interrelate?

Choice theory solves this puzzle. It shows how contract law can enhance individual autonomy while at the same time providing people with the economic and social benefits they seek. Thus, we recognize autonomy as contract law’s ultimate value, as set out in Chapters 4 and 7. At the same time, we note that people usually do not enter into specific contracts to become freer. Sometimes, people contract to achieve “utility,” as framed in Chapter 5. Other times, they seek “community” – the somewhat clunky term we define in Chapter 6 to encompass the social benefits of contracting, as distinct from utilitarian ones. Contractual autonomy operates primarily, but not entirely, to ensure that people can make effective choices among these values when they so choose.

For efficiency theorists, we offer a path back from the uncomfortable collectivist position implied by an exclusive focus on maximizing social welfare, and we give them a normatively appealing way to situate efficiency analysis within a liberal framework. Most efficiency theorists care about freedom, but they haven't had a compelling way to incorporate that concern into their models besides some hand-waving in its general direction.

We show the way: efficiency theorists must, at the least, adopt as friendly amendments five theoretical points in Chapter 8 and consider a somewhat larger number of novel doctrinal reforms sprinkled throughout the book and collected in the Conclusion. In short, freedom has a price.

#### A THEORY OF LAW

Finally, to qualify as a liberal and general theory of *law*, we consider seriously the distinctive reform program of choice theory. It boils down to two components: first, a liberal state is obligated to ensure intra-sphere multiplicity; second, the meaning of trans-substantive or "general" contract law concepts should vary according to the "local" animating principles of particular contract types. We consider these in turn:

1. *The State's Affirmative Role*. Prior autonomy-based theories have conflated ideal contract law with legal passivity, that is, with the commitment that law aim just to enforce the parties' wills and maybe cure discrete market failures.

By contrast, choice theory shows why a state committed to human freedom must actively enable people's relationships by shaping distinct contract types. Contract law has a crucial role to play in delivering on the liberal promise of freedom. The state may betray this autonomy-enhancing mission not only by having bad law or too much law; law's absence may undermine it just as well.<sup>3</sup> Put more sharply, choice theory shows that liberal states are affirmatively obligated to ensure an adequate range of contract types in each important sphere of human interaction – subject to concerns about comparative institutional competence discussed in Chapter 12.

Choice theory is at its strongest in analyzing new and emerging contract types – in areas as diverse as gestational surrogacy, employment in the sharing economy, and the partnership structure of law firms. While the market for contractual innovation is vibrant, particularly in the commercial sphere, there is no reason to believe that existing types either exhaust the variety of goods that people seek by contracting or are best configured to support their divergent goals.

2. “Local” Contract Law. A second implication of choice theory is to challenge the idea that “general” contract law principles should have a universal meaning across contract law.<sup>4</sup> The seeming incoherence of this view, which advocates multiplicity in the name of one underlying commitment to autonomy, dissolves once we appreciate its reliance on a familiar, autonomy-based commitment to pluralism. Our method has the virtue of providing a textured way to evaluate the fine doctrinal details of contract law, as we discuss in the back half of the book.

We show that the application of familiar contract concepts – including, for example, liquidated damages, efficient breach, and the duty of good faith and fair dealing – should vary depending on the normative concerns driving different contract types. Even voluntariness, the most trans-substantive contract concern, should be understood differently in different types, and the doctrinal tools used to protect this concern should vary accordingly. Further, we show how universal application of “general” contract law doctrines has led to doctrinal confusion in long-standing contract types. We give examples of how choice theory can improve our understanding of, for example, the law of agency, bailments, consumer transactions, fiduciaries, and suretyship – the ABCs of traditional, pre-Willistonian contract law.

A consistent commitment to autonomy as the normative foundation of contract implies that doctrinal interpretation and evaluation should, by and large, look to the “local” animating principles of existing contract types rather than to any “core” principle of contract law. While this stance may seem novel to some American contract theorists, it can be understood as a principled analogue to the ordinary, taxonomic civil law approach in which “the classification of the contract as a particular type[,] generates a set of abstract expectations as to what is central to that contract.”<sup>5</sup>

#### CONTRACTS AS A WHOLE

It should be apparent already that choice theory makes two substantial departures from contemporary approaches to contract. As noted in the Preface, we are interested in the field as a whole and we take seriously the centrality of freedom to contract. A few more words on these departures may be helpful.

1. *The Willistonian Constraint.* In our view, contract theory seems to have reached “an impasse” primarily because the field of study has been so artificially constrained. If you ask theorists about marriage or surrogacy contract types, many answer: that’s family law, not contracts. How about new forms of worker contracts? That’s employment or labor law. Consumer

transactions? They're part of the regulatory state. Rather than embracing diverse types, contract theory has shrunk its focus to certain commercial transactions.

This conceptual shrinkage represents an ahistorical and misleading view of contract.<sup>6</sup> From Roman times nearly to the present, contract law was built on an appreciation of the role of existing and emerging contract types. Ancient Roman law itself was marked by a divide between “nominate” contracts (contract types) and “innominate” contracts (freestanding bargains), a distinction that persists in European civil law systems.<sup>7</sup> For example, German law today offers a taxonomy of “typical” contract types, each with its own tailored doctrines; it has methods for shunting analysis of “hybrid” or “mixed” contracts through the existing types; and it deploys recognition mechanisms for “atypical,” “customary,” and “new” types.<sup>8</sup> By contrast, contract theory in America has lost sight of this deep structure.

The story of how contract was transformed in America is beyond our scope here. It is enough to mention that this process shifted contract theory from concern with distinctive types to a trans-substantive, stylized, and seemingly universal approach. The transition began with the work of Christopher Columbus Langdell in the late 1800s, was crystalized in Samuel Williston's 1920 treatise *The Law of Contracts*, and was fully cemented in the 1932 *First Restatement of Contracts* (with Williston as Reporter).<sup>9</sup> Perhaps because of his abiding concern with creating a national, uniform legal architecture for commerce, Williston made many actual contracting practices seem peripheral – or outside of contract law altogether. This distinctive, early twentieth-century American trajectory elevated commercial transactions to the core of contract, and, as a byproduct, substantially obscured the generative role of diverse contract types.

Williston's aspiration to transcend contract types with “general” law is understandable and indeed laudable (especially if reframed as the “residual category of freestanding contracting” that we suggest in Chapter 8). But lawyers cannot rely on “general” contract law to engage with the key elements of employment, family, or other ordinary types of contract – even if the law were redesigned as we recommend. To rely on any general view would often constitute malpractice.<sup>10</sup> And yet, contract theory today is dominated by the notion of general contract law and is structured around the specific, not very representative, sphere of commercial contracting.

So, in brief, the first substantial departure for choice theory is to push back against the Willistonian notion that the core of contracting is dickering over terms within a commercial deal. Such transactions are surely important, but they are not the platonic type of any contracting sphere, not even – as it turns



out – in a world of commerce, a world that has been increasingly affected by collaborative contracting, strategic alliances, and business networks, among many other innovative practices. While we are not the first to note the overlooked role of contract types – relational theorists following Karl Llewellyn’s lead have also resisted the Willistonian move<sup>11</sup> – we are the first to offer a normative account that connects the multiplicity of types with its role in enhancing freedom.

2. *Teaching Contract Law*. Unfortunately, contract law teaching has followed Williston’s commercial law push. The leading casebooks through which American law students learn contracts are all organized along trans-substantive lines and marginalize many noncommercial contracting practices from their explanatory field.<sup>12</sup> Each presents *Wood v. Lucy, Lady Duff-Gordon*, *Williams v. Walker-Thomas Furniture*, *Jacob & Youngs v. Kent*, *Hadley v. Baxendale*, *Taylor v. Caldwell*, and the same few dozen primary teaching cases (with minor variations) to drive home a Willistonian agenda supported by a thin utilitarian scaffolding. By our count, the strong majority of the roughly 1200 excerpted cases in the top six casebooks have a commercial focus.<sup>13</sup> No book contains even a single chapter devoted to noncommercial contract types and none offers a coherent framework for analyzing what is distinctive about contracting in the spheres of work, home, or intimacy.<sup>14</sup>

Wisps of conceptual and normative concern appear sporadically when the books note “deviations” from a trans-substantive application of concepts such as promissory estoppel, unconscionability, consideration, specific performance, or misrepresentation.<sup>15</sup> These deviations appear mostly as instances of judicial application of “public policy” or equitable powers in noncommercial contexts – in contrast to the vast majority of excerpted cases decided “at law” and used to illustrate rule-based, commercially oriented, trans-substantive principles.

It’s a mistake, though, to say that cases decided on public policy or equity grounds are outliers from a coherent core. Public policy and equity tap into threads of contract law as deep as those decided at law. The challenge for students is that the casebooks do not offer them (or their professors) any coherent vocabulary for talking through what principles might animate public policy or equity. Are these concepts threaded coherently through contract law or are they just an ad hoc grab bag? When should we apply which principle?

In addition, the “general” law taught to 1Ls gives them no purchase on the diverse family, work, home, and consumer contract types they encounter in upper-level “contracts” classes and later in legal practice. Students begin their

careers without a language for thinking through why contract law appears as it does and without tools for arguing how it should be shaped going forward – other than some undeveloped utilitarian commitments.

It may be worth noting that contract is a private law outlier. Other private law fields have not gone through quite the same flattening process. For example, property still focuses on recurring dilemmas of distinctive property types – that is, conveyancing, leasing, servitudes, co-ownership, and intellectual property – and the particular normative concerns underlying each of these property institutions. Torts, too, still retains some of the lumpy quality of pre-Williston contracts (notwithstanding the exaggerated teaching focus today on negligence).

The first-year contract law curriculum represents Williston's greatest victory. To the extent this book has a pedagogical purpose, it is to shift the conceptual framework and normative language that students – and later lawyers, judges, and scholars – bring to analyzing contract in America. To start, we reject Williston's answer to the question, "what is contract?"

#### THE NATURE OF CONTRACTUAL FREEDOM

Our second departure concerns the nature of contractual freedom. This is not a new problem. Some liberal contract theorists – notably Charles Fried in *Contract as Promise* – take Kant as their starting point. Others start with a libertarian philosopher like Robert Nozick. Depending on which aspect of freedom they celebrate, liberal theorists have given the resulting approaches names such as "promise theory," "transfer theory," and "consent theory." All these modern theories share a crucial element: they answer the question "what is freedom?" with a rights-based (or deontological) view of contract that excludes consequentialist (or teleological) elements.

While these theories make many useful contributions, as a group, they have reached a dead end. This is not to condemn deontological theories of private law in general. It may be possible, for example, to construct a persuasive deontological approach to tort law. Our claim is more targeted: despite several decades of sustained effort, rights-based theories of contractual autonomy, and the ambitious reform programs they advance, have failed. It is time to move on.

The crucial wrong turn of existing liberal contract theories is to associate the phrase "freedom of contract" with negative liberty or personal independence, that is, with the idea that contract law should enforce whatever private deals individuals agree to and otherwise get out of the way. In large measure, this view is the philosophical counterpoint to the Willistonian project – and