

THE CHOICE THEORY OF CONTRACTS

This concise landmark in law and jurisprudence offers the first coherent, liberal account of contract law. *The Choice Theory of Contracts* answers the field's most pressing questions: What is the "freedom" in "freedom of contract"? What core values animate contract law and how do those values interrelate? How must the state act when it shapes contract law? Hanoch Dagan and Michael Heller – two of the world's leading private law theorists – show exactly why and how freedom matters to contract law. They start with the most appealing tenets of modern liberalism and end with their implications for contract law. This readable, engaging book gives contract scholars, teachers, and students a powerful normative vocabulary for understanding canonical cases, refining key doctrines, and solving long-standing puzzles in the law.

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CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press
978-1-107-13598-7 — The Choice Theory of Contracts
Hanoch Dagan, Michael Heller
Frontmatter
[More Information](#)

CAMBRIDGE UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom
One Liberty Plaza, 20th Floor, New York, NY 10006, USA
477 Williamstown Road, Port Melbourne, VIC 3207, Australia
4843/24, 2nd Floor, Ansari Road, Daryaganj, Delhi – 110002, India
79 Anson Road, #06–04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org

Information on this title: www.cambridge.org/9781107135987
10.1017/9781316477045

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First published 2017

Printed in the United States of America by Sheridan Books, Inc.

A catalogue record for this publication is available from the British Library.

ISBN 978-1-107-13598-7 Hardback

ISBN 978-1-316-50170-2 Paperback

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*For Ifat
H.D.*

*For Debora, Ellie, and Jonah
M.H.*

Contents

<i>Preface</i>	<i>page xi</i>
Introduction	1
PART I AUTONOMY AS A CONTRACT VALUE	17
1 The Challenge of Autonomy	19
Caveats and Lessons	19
Fried's Contribution	20
Internal Challenge	22
External Challenge	23
2 Promise Theory	25
Stakes of Promise Theory	25
Morality of Promise	26
Promise and Transfer	27
Normative Implications	28
Transfer Theory Roots of Promise Theory Reforms	29
Digression on Philosophy of Promise	30
3 Transfer Theory	33
What Does Contract Transfer?	33
Three Shared Features	34
Contract and Property	36
Duty and Power	37
Normative Failure	39
4 Recovering Autonomy	41
From Independence to Self-Determination	41
Instrumental, Intrinsic, and Ultimate Values	43

	Affirmative Duties in Private Law	45
	Affirmative Duties in Contract Law	46
	PART II THE GOODS OF CONTRACT	49
5	Utility	51
	Internal and External Values	51
	Utility and Autonomy	52
	Business Contracts	53
	Limits of the Business Contracts Example	55
6	Community	58
	Value of “Community”	58
	Different “Relations”	59
	Thick Community	60
	Thin Community	61
	Limits of Thick and Thin Theories	63
	PART III THE CHOICE THEORY OF CONTRACTS	65
7	Contractual Freedom	67
	Roadmap	67
	From Autonomy to Choice	68
	Intra-Sphere Multiplicity	69
	Employment and Consumers	70
	State Obligations	72
	Law’s Role	72
	Culture	74
	Regulation	76
8	How Contract Values Relate	79
	Horizontal Coexistence	79
	Consumer Transactions Revisited	80
	Voluntariness as Common Denominator	82
	Freestanding Contracting	84
	Autonomy as Side Constraint	84
	Relational Equality	86
	Challenge of Neutrality	88
	Price of Freedom for Efficiency Analysts	90

Contents

ix

9	Contract Spheres	93
	False Core	93
	Three Motivating Examples	93
	Role of Spheres	95
	Four Spheres	96
	Two Instrumental Roles	97
	Sub-Spheres of Commerce	98
	Obligation to Support Low-Demand Types	99
	State Contracts	100
10	Contract Types	102
	Local Values	102
	Tailoring Law	103
	Mid-Game and End-Game Dramas	105
	Adequate Range of Types	106
	Two Wrinkles	108
	Mandatory Rules and Sticky Defaults	109
	How Mandatory Rules Can Enhance Autonomy	111
11	The Market for New Types	114
	Markets Come First	114
	State's Obligation of Multiplicity	115
	Employment	116
	Families	119
	Homeownership	122
	European Pluralism	124
12	Choice Theory in Practice	127
	A Happy Fantasy?	127
	Substantive Limits	128
	Institutional Concerns	130
	Conclusion	135
	Taking Stock and Next Steps	135
	Beyond Williston	136
	Beyond Fried	137
	<i>Acknowledgments</i>	139
	<i>Notes</i>	141
	<i>Index</i>	175

Preface

We aim to persuade you to adopt a liberal view of contract law. To achieve this goal, this book offers *choice theory*, an approach that departs from contemporary accounts in two ways: it analyzes the field as a whole and puts freedom back into “freedom of contract.”

* * *

Our first departure is to explore contract as a whole, not just the narrow commercial issues that are of primary scholarly concern today. For millennia, contract law has been organized around a diverse array of off-the-shelf solutions for many of life’s pressing contractual challenges – that is, around contract types for family, work, and home, along with commerce.

But then, in the late 1800s, classical legal thought in America began shifting contract’s terrain. The transition culminated in the 1920s with Samuel Williston’s multivolume treatise, *The Law of Contracts* – a work that still shapes the everyday law. Williston’s goal was to unify a body of law whose fragmentation, in his view, obscured the field’s basic principles. The result of his project was to give pride of place to commercial contracts, and as a by-product, render peripheral the diversity of other contract types.

Williston replaced the *unprincipled multiplicity* of the common law (and European civil law) with the *unprincipled uniformity* that dominates American contract law today. This shift had an unexpected implication: if contracts are for commerce, then the law should maximize utility, a goal understood primarily in terms of material benefits. Competing values like autonomy and community could be ignored because they came to be seen as outside the field.

But what if the values contracting parties actually care about are in conflict? It’s here that the now-conventional scope of the field (the Willistonian project)

and the now-dominant method of inquiry (efficiency analysis) fall short. Utility matters, but it is not the sole, or even the dominant, value people seek when contracting.

Despite Williston's success in reshaping the field, existing contract law still offers types that vary widely in their normative structures: some are indeed organized to promote utility, others to enhance community, but most aim to achieve a mix of these values. In large measure, what ensures contractual autonomy is people's continuing ability to choose from among diverse types within each important sphere of human interaction. Based on this descriptive reality, and the normative imperatives it suggests, we renew the focus on contract types and, in so doing, reject Williston's answer to the question, "What is contract?"

* * *

Our second departure is to offer a rigorous normative account of contract types. Freedom comes first. Ours is a liberal account that takes seriously contract's role in enhancing autonomy.

We are not the first on this path. Charles Fried, in his 1981 volume *Contract as Promise*, recovered autonomy as the moral core of contract. Departing from Williston's *unprincipled uniformity*, Fried aimed at *principled uniformity*. Fried argued correctly that autonomy matters centrally to contract – in this, he made an enduring contribution. But his specific arguments faltered because he missed the role of diverse contract types and because he grounded contractual freedom in a flawed, rights-based view. Despite decades of effort by Fried and by later liberal theorists, we can now say all rights-based arguments for contractual autonomy have failed.

This failure has high costs: if freedom drops away as a justification for contract, then what's left, mostly, is the efficiency approach. But a thoroughgoing efficiency theory of contract has never been persuasive. Other values cannot be banished altogether if, for example, you oppose slavery and endorse marriage. The challenge is to offer a normatively appealing way to situate efficiency analysis within a liberal framework. The first step in that project is to reject Fried's answer to the question, "What is freedom?"

* * *

We offer this book as a counterpoint to Williston and Fried. Choice theory shows how contract law can enhance individual autonomy while, at the same time, providing the economic and social benefits people seek in working together. Our approach returns analysis to the mainstream of twentieth-

century liberalism – a tradition concerned with enhancing self-determination that is mostly absent in contract theory today. By showing how this tradition applies to contract law as a whole, choice theory moves from the *principled uniformity* that Fried attempted to the *principled multiplicity* that liberalism requires.

While not (yet) a restatement of contract law, choice theory offers numerous appealing doctrinal refinements and solves many long-standing puzzles in contract law and theory. It provides efficiency analysts of contract a more secure normative grounding for their work. And it offers teachers and students of contract law, for the first time, a coherent normative vocabulary that makes sense of the casebook canon. Choice theory shows why and how freedom matters to contract.