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.

HANOCH DAGAN is one of the world's leading private law theorists. He is the Stewart and Judy Colton Professor of Legal Theory and Innovation and former dean of the Tel Aviv University Faculty of Law. Dagan has written five books across the landscape of private law topics and has published more than seventy articles in major law reviews and journals. His most recent book is *Reconstructing American Legal Realism & Rethinking Private Law Theory* (2013).

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For Ifat
H.D.

For Debora, Ellie, and Jonah
M.H.

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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?"

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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.