The Choice Theory *of* Contracts

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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."

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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?"

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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.

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."[1] 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.[2]

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.[3] 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.[4] 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."[5]

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.[6] 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.[7] 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.[8] 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).[9] 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.[10] 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[11] – 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.[12] 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.[13] 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.[14]

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.[15] 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

indeed Williston himself advocated such a stance.[16] If contract centrally concerns sophisticated business dealings, then a negative liberty view is neither surprising nor entirely unjustifiable.

But this narrow justification has spread beyond the commercial context. It has become a commitment "fundamental in the orthodox understanding of contract law, that the content of a contractual obligation is a matter for the parties, not the law."[17] The strongest version of this claim comes from the legal economist Richard Craswell, who writes that contractual freedom "has very little to do" with contract law and is thus perceived as "largely irrelevant" to its design.[18] In this view, "freedom of contract" more or less devolves into an essentially hands-off stance for the state, a view that misses much of how contract law can, should, and actually does secure freedom.[19]

Existing liberal contract theories may fit well with limited aspects of commercial contracting, but they fail when expanded to cover contract law as a whole. People want, and the law has always offered, much more than just a negative liberty version of contract. Descriptively, then, existing liberal theories miss the texture of why we contract with one another; conceptually, they overlook key features of contractual autonomy; normatively, they slight the diverse goods of contracting.

The conventional liberal view is bad theory. Bad theory is costly, and not just in theory. Together with the Willistonian project, the negative liberty view has helped splinter contract into disparate and noncommunicating fields. For example, many scholars of work and family define their fields as distinct from, and even in opposition to, contract law. In so doing, they are often trying to shield their contract types from what they see as the troublesome implications of the negative liberty view.[20] But they, and we, pay a high price. We all miss the reform payoffs that come from appreciating the autonomy-enhancing potential of contract in employment, labor, and family law and from leveraging insights arising across the whole of contracting practice.

Another cost of the negative liberty view is subtler. After employment law, labor law, family law, and other core fields flee, what's left in contract law today is mostly the law of commercial transactions. Current liberal theories do not have much that is persuasive to say about business law. Even Fried, in his recent work, finds that his liberal theory substantially dissolves into familiar efficiency reforms.[21] To the extent individuals want their sophisticated business contracts to be primarily wealth-maximizing, efficiency analysis should, for the most part, dominate discussion and liberal contract reforms should have little traction.

Conversely, efficiency theorists understand that efficiency cannot be their only metric, even for business law. But adopting any of the current liberal

theories – with their muddled conceptual apparatuses and unpersuasive normative programs – would exact too high a price. So, efficiency theorists may say freedom "jumpstarts" contract or plays some other minimal role, but liberal values mostly reside outside their models. The turn by efficiency analysis of contract away from liberal principles is costly and premature, both for their own work and for the law's development.

While existing liberal theories of contractual freedom all fail, that does not mean we have to give up on freedom. The mainstream liberal view of autonomy (as self-determination) remains available, and properly understood, it provides a secure justification for contract law. Choice theory plays nicely with efficiency analysis – it puts freedom back into the equation.

THREE METHODOLOGICAL NOTES

Before we hit the road, three methodological comments are in order regarding the nature of our theory and its precise subject matter and limits. The first concerns interpretation, the second focuses on the difference between categories for deciding and thinking, and the final addresses the path from theory to practice.

1. *On Interpretation.* We view our approach as an interpretation of existing contract law in liberal societies, one that crafts a theoretical framework for its doctrines that presents them in their best light. An "interpretive theory" of law, like ours, is aimed not at discovering the original intentions of lawmakers, nor at analyzing law's historical evolution. It is not intended to uproot existing practices, nor to supplant law with wholly innovative ways of organizing society.

Rather, an interpretative theory is situated between discovery and invention.[22] It builds on existing practices and thus reaffirms much of existing law. But it provides an account of these practices that suggests a new perspective on the law, which inevitably upsets some conventional wisdom. It thus points to possible improvements to the law as well as to new questions that offer a research agenda for future reformers and scholars.

Indeed, as Rawls noted, interpretive theories aim at both understanding an existing practice and directing its evolution. Accordingly, they need to distinguish between "core" features of the practice, which serve as fixed points to which a theory must fit, and other features that can be treated with less deference and are thus reexamined and potentially reformed in light of the theory.[23]

Existing theories of contract law indeed make such distinctions (explicitly or implicitly), treating, for example, the expectation measure of recovery or

the consideration requirement as contract's doctrinal core.[24] However, these choices are by no means obvious: consideration, for example, is not even a *necessary*, let alone core, characteristic of contract in most Continental jurisdictions.[25] Furthermore, looking for a rule that runs through the various contract types already presupposes the flattening Willistonian view of contract as a shapeless unified form.

Therefore, our choice of core is different in kind: choice theory focuses exactly on what the now-conventional view obscures – the multiplicity of contract types that typifies actual contract law. We present this multiplicity in its best light by highlighting its autonomy-enhancing function. As with any other interpretive theory, we cannot expect our interpretation to explain every extant feature of the law. But the gaps that choice theory reveals are useful: they help focus attention on whether and why the law doesn't live up to its own (implicit) ideals.[26]

What first appears as a blemish on the law turns out to be the most important takeaway of choice theory – the relative paucity of types in the realms of family, work, and home compared with the sphere of commerce, and the state's obligations in response.

2. *On Deciding and Thinking.* Putting multiplicity front and center raises a second methodological conundrum. If the differences among contract types are as significant as we claim, does that then imply that "contract" is not an important overarching category, which in turn means that there cannot be a general theory of contract law?

No. A general theory is possible if we keep in mind the distinction between categories for *deciding* and categories for *thinking*.[27] Choice theory does imply that the normative concerns underlying contract types are so diverse that simply labeling something as "contract" is not enough to justify any concrete reform consequence. In other words, we cannot justify treating contract as a category for deciding.

Nevertheless, this does not eliminate the significance of contract as a doctrinal category. Quite the contrary. While normative concerns differ among types, there are enough structural similarities that "contract" is still a useful category for thinking. For example, because all contract types must be voluntary – given our fundamental commitment to autonomy as contract's (one) ultimate value – securing voluntariness is a common challenge of otherwise heterogeneous types. Thinking about the proper means for facing this challenge across contract types may be helpful even if we conclude, as we do in Chapter 8, that it is best handled by prescribing distinct doctrinal tools tailored to the normative valences of particular contract types.

Further, the underlying values animating diverse contract types do overlap: they all aim at securing the instrumental and intrinsic goods of contract – primarily utility and community – while securing autonomy, always as the ultimate value and sometimes as a side-constraint (distinctions we set out in Chapters 4 and 7). This overlap ensures that reflecting on the variety of contract types is likely to yield some useful cross-fertilization and that, in turn, justifies studying them together and treating them as the subject matter of unified scholarly analysis.

Finally, appreciating the common function of all contract types in the service of people's autonomy is crucial because it implies that, for every sphere of potential contracting activity, the state should provide a robust menu of choices. It also implies that a liberal state must develop a category of "residual contracting" for people who prefer to reject contract law's favored forms of interaction (a category that may look quite different from the "general" contract law of existing theory).[28] Freedom to choose among types can and does sit comfortably alongside the freedom to dicker over terms.

3. *On Theory and Practice*. As our title indicates and the text will confirm, this is primarily a book in contract law theory. The front half criticizes existing approaches; the back half offers an alternative. Our goal, though, is not just better theory but also better practice.

We advance an innovative conception of contracts because we believe that adopting choice theory and implementing its reform agenda will enhance the self-determination of real people in the real world. Demonstrating a viable path from theory to practice is, therefore, crucial. Otherwise, choice theory is just a happy fantasy. Indeed, we suspect that some readers may become impatient with questions of implementation even in reading this Introduction.

As we see it, these concerns come in two main forms: substantive and institutional. Substantively, critics may worry that our call for multiplicity of contract types will overlook the limits and drawbacks of choice. What if more choice reduces freedom? Institutionally, critics may be concerned that our references to "contract law" doing this or that means we believe that the disembodied "law" is somehow the agent that should offer contract types or facilitate choice within spheres. Are there actual legal institutions sufficiently competent to implement choice theory?

These are legitimate challenges for anyone concerned with putting choice theory into practice. We postpone our reply to Chapter 12, not because the challenges are unimportant, but because a reply requires that we first set out the contours of choice theory. On the substantive side, we identify a range of cognitive, behavioral, structural, and political economy concerns about

expanding choice. We offer this list as a research agenda for interdisciplinary scholars interested in implementing choice theory.

Regarding the institutional challenge, we can sketch out some more practical steps. For example, in the sphere of commerce, we often see market demand driving the creation of new business contract types. Sophisticated commercial parties are likely to be the best type-developers in this sphere. They share a wealth-maximizing metric for evaluating terms and they are motivated to do a good design job because they can directly capture much of the surplus they generate.

Challenges arise when the parties' overriding goal moves away from wealth maximization. Then, there is less reason to expect market demand to drive creation of sufficient types. Implementing choice theory thus devolves into a study of comparative institutional competence of actors including state legislatures and judges, the American Law Institute (ALI) and the Uniform Law Commission (NCCUSL), along with public interest groups, law firms, and lobbyists.

One approach is to encourage states to adopt successful types from other states or countries (we give examples of this "comparative" strategy). Another is to encourage them to support rather than squash emerging and utopian types for which there is already some level of demand (the "experimental" strategy). Institutions such as the ALI or NCCUSL may be able to refine innovative types, say for cohabitation, civil unions, "dependent contractors," and so on (the "incremental" strategy). We aren't arguing that any of these institutions should initiate new contract types from scratch. How would they pick? Our thoughts in this section are admittedly preliminary because full answers will inevitably be linked to a particular contract type or a specific state or national institutional design.

Thus, our argument in Chapter 12 about putting choice theory into practice is somewhat modest, but nonetheless crucial. Most important, we rule out the (devastating) possibility that substantive and institutional criticisms are all-encompassing, and show instead that they are local to particular contract types or institutional settings. There is room to implement choice theory such that contract law does a better job than the status quo in enhancing people's self-determination.

A BRIEF ROADMAP

Part I examines the contributions and limits of prior autonomy-based contract theories. We show why Fried's approach to contractual autonomy cannot work and why all the later rights-based versions from promise theory to transfer

theory fare no better. Nevertheless, we argue that autonomy, understood as self-determination, is still the ultimate value of contract. Much of the work here is heavy-duty jurisprudence – we aim for brevity while trying to provide enough detail to persuade the specialists.

Part II explores the main goods people seek from contracting. People generally do not enter contracts to become freer, although autonomy does function as an important side-constraint. The main goods of contract are utility and community, as we define the terms. We show why neither good works alone as the ultimate contract value, but both are essential to any complete theory of the field.

Part III sets out choice theory and shows how contract law plays a positive, active, and previously underappreciated autonomy-enhancing role. We start by developing a more tailored view of autonomy for contract and show how that value relates to utility and community. Values in conflict are the toughest challenges, and we show how to resolve them. Then we spell out how those values relate to contract spheres and types – refining choice theory along the way, answering potential objections that it generates, and showing how it resolves many doctrinal puzzles.

Our Conclusion sketches some of the challenges choice theory must face and the research agenda that it generates as we move beyond Williston and Fried. Choice theory shows that contract law matters even more to freedom than has previously been understood.

* * *

Choice theory has several virtues. It offers a normatively attractive view of freedom through contract law. It provides the first conceptually coherent account of core contract values and their interrelationships. And finally, choice theory marks a path for reform that brings contract law closer to widely shared liberal ideals.

Notes

INTRODUCTION

1 Peter Benson, *Contract, in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 24, 29 (Dennis Patterson ed., 2d ed. 2010).

2 *Cf.* Mark Pettit Jr., *Freedom, Freedom of Contract, and the "Rise and Fall"*, 79 B.U. L. REV. 263 (1999). *See also* Friedrich Kessler, *Contracts of Adhesion – Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 641–42 (1943) ("freedom of contract must mean different things for different types of contract").

3 *Cf.* ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 201–03 (2011) (emphasizing "the pathologies that follow from law's absence").

4 *Cf.* Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Text* and *Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 82–83 (2014) (noting the dangers of generalist courts interpreting contract law in specialized areas, here insurance law).

5 CHRISTOPHER MCCRUDDEN, BUYING SOCIAL JUSTICE: EQUALITY, GOVERNMENT PROCUREMENT, & LEGAL CHANGE 529 (2007) (noting also that in the civil law approach to contracts, "central to [ ] understanding the subject matter of [any] particular contract will have been an earlier choice made on what *general* type of contract is involved [so that the] initial classification process is a vital part of the process of understanding what will be considered by the courts to be central when assessing the subject matter of the contract.").

6 *See* Tony Weir, *Contracts in Rome and England*, 66 TULANE L. REV. 1615, 1638–39, 1647 (1992).

7 "Nominate" contract types came first, followed later in the Justinian (Byzantine) period by recognition of "innominate" contracts, that is, contracts that do not belong to any recognized, "nominate," contract type – a reform driven perhaps by the difficulties of a "contract-types-only" regime or maybe by the desire for freestanding contracting. *See* REINHARDT ZIMMERMAN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVIL TRADITION 534–35 (1990); *see also* J.A.C. THOMAS, TEXTBOOK OF ROMAN LAW 311 (1976) ("The 'innominate' contracts constitute the

nearest approach that Roman Law made to a generalized system of contract"); *but see* Alan Watson, *The Evolution of Law: The Roman System of Contracts*, 2 LAW & HIST. REV. 1, 19 (1984).

8 The classification of types can be found in all the main commentaries to the German Civil Law Code § 311 (which establishes a general freedom of contract). *See, e.g.*, VOLKER EMMERICH, MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 311 (7th ed. 2016); BARBARA VOR GRÜNEBERG, PALANDTS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, prologue to § 311 (75th ed. 2016); MANFRED LÖWISCH & CORNELIA FELDMANN, STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 311 (2012). Dozens of "typical" contract types are named, described, and regulated in the Code (such as contracts for purchase, § 433 BGB, loan, § 488 BGB, services, § 611 BGB, partnership, § 705 BGB, and marriage, § 1405 BGB) or in another statute (such as commission contracts, § 383 HGB, or insurance contracts, VVG). When contracts mix elements, German law has two main ways (the "absorption" and "combination" methods) to shunt analysis of "hybrid" or "mixed" contracts through the distinctive law of underlying "typical" types. *See infra* Chapter 12, note 4 (noting when each method applies). "Atypical" types, such as guarantees (RGZ 146, 123; 165, 47; BGH 14.10.1982, III ZR 14/82, WM 1982, 1324) or swap agreements (OLG Stuttgart 14. 12. 2011, 9 U 11/11) have their own method of analysis. Finally, German law has mechanisms for dealing with "mixed" or "atypical" types that, through long usage, become firmly established (such as franchising contracts, OLG Düsseldorf, NJW-RR 1987, 631). Courts may recognize them as distinctive "customary" types, GRÜNEBERG, *supra*, prologue to § 311 para 12 (citing cases), or as "new" types, MICHAEL MARTINEK, MODERNE VERTRAGSTYPEN (1991–1993); alternatively, they may be codified into the BGB (such as payment services contracts, § 675f BGB). Thanks to Bertram Lomfeld for clarifying the German approach to types.

9 *See* SAMUEL WILLISTON, THE LAW OF CONTRACTS (1st ed. 1920); RESTATEMENT (FIRST) OF CONTRACTS (1932).

10 *Cf.* BRIAN H. BIX, CONTRACT LAW: RULES, THEORY, AND CONTEXT 159–60 (2012) (emphasizing the significance of the differences among contract types).

11 *See respectively, e.g.*, Karl N. Llewellyn, *The First Struggle to Unhorse Sales*, 52 HARV. L. REV. 872, 880, 904 (1939); Robert E. Scott, *The Promise and the Peril of Relational Contract Theory*, in REVISITING THE CONTRACT SCHOLARSHIP OF STEWART MACAULAY: ON THE EMPIRICAL AND THE LYRICAL 105, 108 (Jean Braucher et al., eds., 2013).

12 We examined RANDY BARNETT, CONTRACTS: CASES AND DOCTRINES (5th ed. 2012), JOHN DAWSON, ET AL., CONTRACTS: CASES AND COMMENT (10th ed. 2013), E. ALLEN FARNSWORTH, ET AL., CONTRACTS: CASES AND MATERIALS (8th ed. 2013), TRACEY E. GEORGE & RUSSELL KOROBKIN, K: A COMMON LAW APPROACH TO CONTRACTS (12th ed. 2012), CHARLES L. KNAPP, ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (7th ed. 2012), and ROBERT E. SCOTT & JODY S. KRAUS, CONTRACT LAW AND THEORY (5th

ed. 2013). *See also* LAWRENCE J. FRIEDMAN, CONTRACT LAW IN AMERICA 25 (1965); *but see* MACAULAY ET AL., CONTRACTS: LAW IN ACTION (3d ed. 2011) (a rare contracts casebook still organized around types).

13 Of 1255 excerpted cases overall, 728 are commercial, 197 employment, 155 home, and 75 family. FARNSWORTH, ET AL. – the dominant casebook with over half the market – has 120 commercial, 27 employment, 23 home, and 13 family cases. We counted mixed sales of goods and services (say, in construction contracts) as employment cases, but they fit perhaps better as commercial cases. Also, many family cases arose in promissory estoppel settings, and maybe should not be counted as contracts at all. So, the ratio of commercial cases to other cases is, if anything, higher than we report.

14 Lawrence Friedman wrote, back in 1965, that contract law teaching is like "a zoology course which confined its study to dodos and unicorns." FRIEDMAN, *supra* note 12, at 20.

15 For example, in the notes of an undue influence case, FARNSWORTH, ET AL., *supra* note 12, at 385, remarks that, "[a]lthough the court found that no confidential relationship existed between Odorizzi and his employers, such a finding is often central to avoiding a contract on the basis of overreaching." Thus, the tightness of the contracting community sometimes matters, but the book does not pin down when. SCOTT & KRAUS, *supra* note 12, at 860–61, note thirteenth amendment concerns that keep specific performance from being available in contracts for services. But they don't explore the extent to which autonomy concerns should limit contracting parties' ability to bind themselves to deliver services. KNAPP ET AL., *supra* note 12, at 599–635, illustrates how unconscionability doctrine applies in consumer contracts, but does not help sort through what makes this contract type distinctive.

16 *See* Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 368–69, 373 (1921) (developing an early incarnation of this view).

17 STEPHEN A. SMITH, CONTRACT THEORY 59, 139 (2004).

18 Richard Craswell, *Freedom of Contract*, *in* CHICAGO LECTURES IN LAW AND ECONOMICS 81 (Eric A. Posner ed., 2000); *but cf.* Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821 (1992).

19 *See generally* HANS-W. MICKLITZ, ON THE INTELLECTUAL HISTORY OF FREEDOM OF CONTRACT AND REGULATION (2015) (offering a nuanced comparison of the meanings of "freedom of contract" in the United Kingdom, France, Germany, and the European Union and their respective intellectual histories).

20 *See, e.g.*, Martha Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1173 (2014) (noting "a possible objection to surrogacy is that it inserts contract into what has traditionally been an intimate realm").

21 *See* Charles Fried, *The Ambitions of* Contract as Promise *Thirty Years On*, *in* PHILOSOPHICAL FOUNDATIONS OF CONTRACT 17, 23 (Gregory Klass et al., eds., 2014).

22 On the distinction between invention, discovery, and interpretation, see MICHAEL WALZER, INTERPRETATION AND SOCIAL CRITICISM 1–32 (1987).

23 *See* JOHN RAWLS, A THEORY OF JUSTICE 19–20, 48–49 (rev. ed. 1999).

24 *See, e.g.*, Robin Bradley Kar, Contract as Empowerment II: Harmonizing the Case Law, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2476759.

25 *See, e.g.*, KONRAD ZWEIGERT & HEIN KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 159 (Tony Weir trans., 2d ed. 1987); GERHARD DANNEMANN & STEFAN VOGENAUER, THE COMMON EUROPEAN SALES LAW IN CONTEXT: INTERACTIONS WITH ENGLISH AND GERMAN LAW 263 (2013).

26 *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 118–23 (1977).

27 *See* Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 164 U. PA. L. REV. 1889, 1910, 1915–16 (2015).

28 *See infra* Chapter 8, text accompanying notes 23–27.

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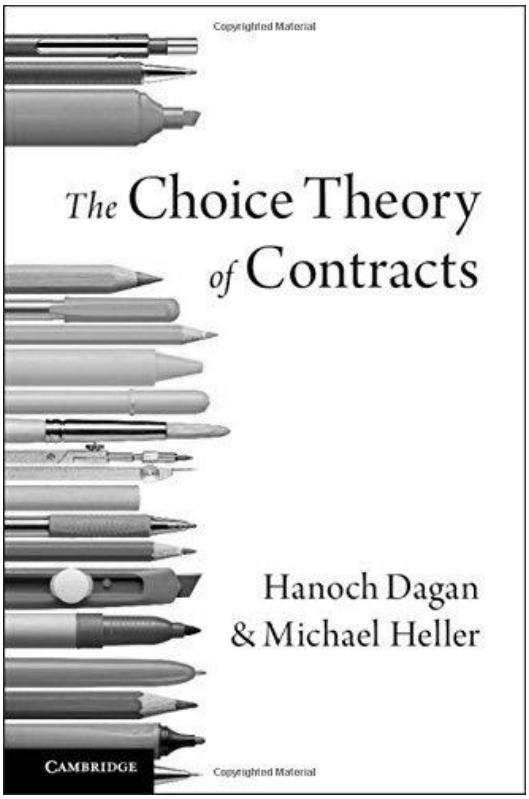

THE CHOICE THEORY OF CONTRACTS

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BOOK DESCRIPTION:

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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