

*The Choice Theory of Contract*. By Hanoch Dagan and Michael Heller. [Cambridge University Press, 2017. xiv + 180 pp. Hardback £80.00. ISBN: 978-11-07135-98-7.]

While no book ought to be judged by its cover – nor its title, back cover, blurb or preface – *The Choice Theory of Contract* invites strong early impressions. The title intrigues first, with the sheer breadth of theoretical appropriation it communicates. The centrality of ideas of voluntariness and free choice in the ethos, theory, and doctrinal study of contract law is such that any broad, more or less mainstream contribution to the topic, in the liberal or even non-liberal tradition, could plausibly be labelled “the choice theory of contract”. Turn the title page, and any sense that the authors may have set out to offer a mere survey of the full spectrum of theoretical approaches to their subject, or that they have forgone in advance any claim to originality, is dispelled. The book describes itself as a “landmark in law and jurisprudence” and, in a boast which must test the limits of collegiality in an established and rather crowded field, as “the first coherent, liberal account of contract law”. The blurb departs further from academic publishing convention by providing evaluative descriptions of the authors, as “two of the world’s leading private law theorists” and individually as “one of the world’s leading private law theorists” and “one of America’s leading authorities on property”.

The Preface opens by proclaiming that the book offers 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’” (p. xi). Neither would be recognised as a departure by contributors to the lively contemporary discourse surrounding the philosophical foundations of contract. This discourse is by no means limited to “just ... narrow commercial issues” (which, according to the authors, are “of primary scholarly concern today”), and, within it, the precise meaning of the freedom of contract, its moral, political, economic and social significance, as well as its appropriate limits, take centre stage. Clarifying the second supposed departure, the authors say that “[o]urs is a liberal account that takes seriously contract’s role in enhancing autonomy” (p. xii). But contract’s appropriate role in enhancing personal autonomy (and how to bolster it), as well as the particular threats contract poses to personal autonomy (and how to ameliorate them), have been the main themes informing theory and proposals for doctrinal reform in contract since personal autonomy began to capture the imagination, decades ago, as a moral ideal and political aspiration. The ideal, after all, is one of self authorship. In much the same way that promise empowers people to act as the authors of their own moral obligations, contract is that branch of the law that empowers people to act as the authors of their legal obligations.

That link has become a central preoccupation of friends and foes of the ideology of personal autonomy, and is probably responsible more than anything else for a revival in philosophical contract theory, as well as the philosophy of promise. “Liberal” theories of contract by now have come in so many different shapes, and have been informed by such varied political and moral sensibilities, as to deprive the label “liberal”, in this context as in most others, of much distinction. If there still is one thing common to all “liberal” theories, it is their focus on the intricate connection between contract and personal autonomy.

Happily, the authors do acknowledge that “[w]e are not first on this path. Charles Fried, in his 1981 volume *Contract as Promise*, recovered autonomy as the moral core of contract” (p. xii). Nor are they second on this path. Assuming that recovering autonomy as the moral core of contract could be attributed wholesale to Fried’s 1981 book, the world has not stood still in the intervening 36 years. Alas, we learn that Fried’s argument has “faltered”, and that “[d]espite decades of effort by Fried and by later liberal theorists ... all rights-based arguments for contractual autonomy have failed” – a costly failure, since “if freedom drops away as a justification for contract, then what’s left, mostly, is the efficiency approach” (p. xii).

Freedom has never dropped away, however, and the “tradition concerned with enhancing self-determination” – which, oddly, the authors assert “is mostly absent in contract theory today” (p. xiii) –

is in rude health. Be that as it may, *The Choice Theory of Contract* offers itself up as the remedy to those supposed ills, and much more besides. “While not (yet) a restatement of contract law ... [the book] 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” (p. xiii). It is later revealed that Choice Theory can resolve *the* central debate surrounding the harmonisation project in European law: “If European contract law is formulated along the lines of our proposed choice paradigm, it may be able both to secure the benefits of harmonization and to preserve the liberating choice-based potential of multiplicity ... if there is to be a single European contract law, it should be the choice theory version” (p. 125). And there is more: “offering better theory is not our only goal. We believe implementing the reform agenda of choice theory in practice, scholarship, and teaching will help enhance the self-determination of real people in the real world” (p. 127).

Can a theory of contract achieve such lofty aims? It cannot. But “The Choice Theory of Contract” is not a theory of contract in any familiar sense of the term. It is certainly no theory of “the field as a whole” – there is nothing here about any of the main doctrines and principles of contract law (e.g. formation, intention, consideration, good faith, undue influence, unconscionability, frustration, breach, remedies), nor about such classic theoretical questions as the relationship between contract and promise, or contract and agreement or contract and tort. Rather, it is an essay on the value of contract, centred around a thesis according to which the law of contract can and should promote that value even more, with a consequent proposal for reform. Moreover, as a reform proposal it is not so much about a reform *of contract*, but a reform of all spheres of human activity in which contracts have any role to play, however subordinate, in the pursuit of any goal or aspiration. More than it is a choice theory of contract, it is a choice theory of life.

It works like this. Individual autonomy, understood as self-determination, is contract’s “ultimate” value (p. 16). “Contract serves autonomy by enabling people legitimately to enlist others in advancing their own projects, and thus expands the range of meaningful choices people can make to shape their own life” (p. 47). Part I of the book is devoted to explicating this starting point. It consists of a rapid survey of the state of the art in the literature on “autonomy as a contract value”, and is original chiefly in its claim to establish the false diagnoses that “a tradition concerned with enhancing self-determination is mostly absent in contract theory today” and that existing liberal contract theories all “associate the phrase ‘freedom of contract’ with negative liberty” (p. 10). This is done with wide brush strokes, glib engagement with the literature, and a rather idiosyncratic choice of sources.

More’s the pity the extravagant claims to innovation that follow, as those merely risk obscuring the original contribution that the authors do offer. It concerns the idea of contract *types*, and the manner in which a multiplicity of those would enable contract to offer radically *more choice*, and hence enable it to serve personal autonomy considerably more. Because, the authors observe, the freedom to choose what contracts to enter, with whom and on what terms, is not where the real autonomy-enhancing action is: “bargaining for terms is not the dominant mode of contracting, and it should not determine ... the central meaning of contractual autonomy”. Instead, “contractual freedom means the ability to choose from among a sufficient range of off-the-shelf, normatively attractive contract types ... the mainstay of present-day contracting is the choice among types” (pp. 2-3).

This is the organising idea of the book, and the basis for the extensive reform proposal it articulates. To make good on contract law’s claim to enhance personal autonomy, and to justify the state’s investment in it, the state must “affirmatively act” (p. 114) to secure a wide choice of contract types, and in all spheres of contracting – commerce, family, employment, and so on. A multiplicity of ‘off-the-shelf’ types in each sphere would cater for “the diverse, sometimes conflicting, substantive goods, material and interpersonal, that people seek from contracting” (p. 64) – such as thinner or thicker or no relationships with their counterparts, better price or greater consumer protection. Choice, on any vision

of the accomplished reform, would grow exponentially, especially since “[e]ven relatively moderate demand can justify the creation of a new type” (p. 99), and since regulation of an activity via mandatory rules is legitimate only where “people are able to engage in that activity using an alternative, less-regulated contract type (so invoking the regulated contract type reflects an exercise of meaningful choice)” (p. 111). Moreover, all the newly-created off-the-shelf types would not replace but stand *alongside* the “residual type of freestanding contracting”, of which people will still be able avail themselves so as to “custom craft their own contract” (p. 126).

What exactly *are* types? How different must two contractual arrangements governing the same transactional terrain be to count as different types? More than the authors’ fleeting conceptual analysis of questions of such crucial importance to the claims of the book, it is the examples they use that reveal what they have in mind. Buyers of goods or services should be able to choose between the consumer protection model that has become the norm – that is one type – and contracting under a type that waves protection but opens the way to a lower negotiated price (p. 82). In employment, a divergence of types corresponds to distinctions such as those between ‘at will’, ‘for cause’, and ‘dependent contractor’ employment, as well as to distinctions between unionised labour and various alternatives to unions (pp. 116-119). In the family sphere, there are contract types corresponding to different adoption and surrogacy arrangements, such as “altruistic” versus “commercial” surrogacy, and different life partnership arrangements, of which “marriage” constitutes one type and its alternatives other types (pp. 119-122).

With regard to all these examples, as well as many more and on an open-ended scope, *The Choice Theory of Contract* has a consistent application: “Choice theory suggests reforming the sphere of employment” (p. 116); “Choice theory celebrates the development of alternatives to conventional contract types in family setting” (p. 119). The reasoning, too, is consistent: greater choice brings greater freedom, more autonomy, more avenues to self-determination.

By the time the bare bones of the theory have been shown and rapid progress can be made through example of its implications, from one set of largescale policy recommendations to the next – a bonfire of regulations here, a complete overhaul of entire industries there, a re-imagining of family and family planning, a thorough restructuring of the whole labour market – the “of contract” part of the theory’s name is mostly omitted. This is fitting. If all consumer protection should be rendered optional, contract law would obviously have to be updated. If people ought to have, in all spheres of activity, the vast array of additional choices that the book recommends, the law – and not contract law alone – had better keep up. But no explanation of the value and utility of legally binding agreements or the power to make them can be the *source* of the call for such reforms. The “choice theory” is a theory of something much bigger than contract – indeed, to the extent that it has little to do with contract law *per se*. How does it fare as such?

In view of the vast scale of state-sanctioned choice-expansion that the book endorses, as well as the profound values and goals to which it anchors this project – greater freedom, more autonomy, enhancing “the self-determination of real people in the real world” – the most surprising feature of *The Choice Theory of Contract* may be the sheer thinness of the analysis it offers of choice and its relationship with those values and goals.

This relationship is notably complex, and doubly so in the contractual arena. Yes, meaningful self-authorship requires a meaningful range of options. But the more is not necessarily the merrier. Autonomy-wise, choice is a double-edged sword, and the availability of the wrong sort of choices (or even the right sort of choices but in the wrong circumstances) is liable to endanger personal autonomy rather than enhance it. That danger is particularly acute in the context of contractual activity, where choices become legally binding and enforceable by the might of the state, are costly or impossible to break free from, and involve obligations routinely owed to parties of vastly superior quotients of all relevant powers, from bargaining to access to justice. Thus the literature on personal autonomy in

general, and ('autonomy-based') contract theory in particular, has paid considerable and increasing attention, both conceptually and at the pragmatic or doctrinal level, to the need to remove or discourage autonomy-endangering choices while cultivating the range of potentially autonomy-enhancing ones.

Dagan and Heller are unperturbed. They acknowledge, in passing, that whereas more choice among types *usually* enhances freedom, "[m]uch less often, but in a nontrivial set of cases ... multiplicity cuts the other way" (p. 109), and that "[s]ometimes ... more choice may actually reduce freedom" (p. 127), but hasten to add that that only happens in circumstances that are "local to certain contract types or market structures, not universal to contract as a whole" (p. 127). Although they also acknowledge that "our theory must attend not just to the autonomy-enhancing potential of multiplicity, but also to its limits" (p. 127), it does not. All the authors do, having relegated the examination of "substantive limits on multiplicity" to a two page-long discussion in the final chapter of the book, is identify "four main concerns that may require actively limiting multiplicity or at least guarding against its potential downfall", amongst which are the significant (and not evidently "local") matters of "cognitive constraints", "vulnerable parties", and "political economy". They say that "[f]rankly, we just don't know in which contexts the probable effect of these concerns are significant enough to justify limiting multiplicity" (p. 127), and blame this ignorance on the fact that "for over a century, we've hidden these questions from view under the influence of the flattening and universalizing Willistonian approach" (pp. 127-128). They conclude that "[p]inning down limits on choice amongst types constitutes an important part of the research agenda for choice theory" (p. 130), but then hand over this research agenda, wholesale, to others – "those with the appropriate skill sets to investigate further" (p. 130).

This handover is premature, but also unnecessary. It is legitimate to spell out an idea, lay down the foundations for its normative defence and practical implementation, draw a clear trajectory for further development, and then leave it to others to explore details and logistics or further implications. What Dagan and Heller "hand over to those interested in implementing the choice theory approach in contract law" (p. 109), however, is a lop-sided foundation for an under-developed enterprise. Moreover, no such hand-over is required, since the kind of research agenda for which they clamour and which they claim to have created and has been under way for a long time. Margaret Radin's *Contested Commodities* (1996), for example, with its meticulous analysis of the pros and cons of expanding choice in but a tiny subset of cases involving just one particular set of reasons for circumspection (the risks inherent in commodification), shows how much more nuance and detail and balance is needed when contemplating even a subtle re-drawing of the bounds of freedom of contract with the aim of enhancing human flourishing. It shows how careful a weighing of often-conflicting moral considerations and pragmatic concerns is invariably involved, how much has already been done, and for how long.

The authors' own case for a greater variety of contract types would have gained considerable substance, nuance and plausibility from drawing on such scholarship, as well as scholarship dealing at a more conceptual level with the relationship between self-determination and choice, in general and in the contractual arena in particular. There is always scope for deepening, refining and updating our understanding of what freedom of contract truly means, and what it requires. Possibly, "contract types" have some role to play within this endeavour. But in claiming to "[put] freedom back into 'freedom of contract'" and setting out to make good on such a lofty boast, they end up largely taking contract out. The freedom the book advocates is not substantially informed by the distinctive features of contract or contract law, sheds little light on those in return, and does not do justice to the intricate relationship between freedom and choice.

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