Introduction

The starting point for this issue of *Theoretical Inquiries in Law* is Hanoch Dagan and Michael Heller's book *The Choice Theory of Contracts*. Their book advances a liberal approach to contract, choice theory, which celebrates and justifies contractual freedom. They reject the universalizing tendency of the Willistonian project and highlight the plurality of contract types. According to Dagan and Heller, the principle that grounds contract law is autonomy. Hence, contracts and contract law can, and should, enhance individual autonomy, defined as self-authorship — one's right to write the story of one's own life. And, for that purpose, an adequate range of contract types should be designed and implemented in every important sphere of human interaction.

The Articles presented in this issue engage with this proposed approach, further it in new directions, and provide other perspectives on the matter; Dagan and Heller also reply to some of their critics. The issue is divided into three segments: *Freedom*; *Choice*; and *Contracts*. In the first, the authors engage with differing conceptions of autonomy and their importance to contract theory. In the second, they address issues of choice, which is inherently important for any theory that centers on autonomy. The authors in the third and final segment are concerned with the tension between plurality and unity — a key theme of what Dagan and Heller term the "Contract Canon."

In the opening of the first segment, *Freedom*, Charles Fried engages with the critique presented by Dagan and Heller of his own work, "*Contract as Promise*."[1] Fried acknowledges that the homogenization of all contract types under a single paradigm is problematic. Yet, he argues, the principle of promise can justify the state coercion of individuals who fail to comply with their obligations to others. To support his thesis, Fried uses the Kantian theory of the state and its implication that free and rational individuals will choose to enhance their freedom by binding themselves to their own promises — just as they would expect all free and rational persons to do. At the same time, Fried applauds the rich, useful, and true account of contract provided by Dagan and Heller.

Nathan Oman's Article discusses the appropriate place and scope of contract law as grounded in liberal notions of autonomy. Particularly, Oman argues for

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1 Charles Fried, Contract As Promise: A Theory of Contractual Obligation (2d ed. 2015).

a more limited notion of liberalism, in contrast to Dagan and Heller's view of contract law as an autonomy-advancing institution, first and foremost. The narrower understanding of liberalism that Oman advances is one of fear — motivated by a shared interest in the (relatively) peaceful existence of a pluralistic society and not by a deep agreement based on shared values. Oman further argues that, given that meaningful groups in current society reject the centrality of autonomy, his narrow notion of liberalism is more justified than the broader notion of liberalism advocated by Dagan and Heller. Thus, he rejects the premise that the state's involvement should be expanded so as to offer its people a "menu" of options. Rather, he argues, the scope of institutions' involvement in people's lives should be primarily based on autonomous personal choice. As a result, Oman proposes a market-centered theory of contract law, which is more scope-limited than that of choice theory and could accommodate a broader range of moral differences stemming from different belief systems in various areas of life.

Yitzhak Benbaji closes the first segment by suggesting that, generally, contracts provide a pre-defined selection of preferred options, as opposed to reinforcing individuals' autonomy by widening their choice — thus challenging Dagan and Heller's theory that contract law is autonomy-enhancing. Benbaji finds that those in support of choice theory fail to take into account that, in principle, various contracts implemented by the state's contract law should afford the citizens of a liberal state the opportunity to follow and act upon their universal moral obligations. Benbaji outlines, as an alternative, a Rawlsian justification of contract law, arguing that contract law has the responsibility to ensure that individuals are able to cooperate with others to realize their moral duties and to achieve a fair share of primary goods.

The *Choice* segment is opened by Aditi Bagchi's Article regarding the "Voluntary Obligation and Contract." Bagchi argues that central constraints to autonomous and meaningful choice lie not in law but in the moral and material imperatives in which each party to a contract is situated. Bagchi claims that context, such as circumstantial considerations and background obligations, is a significant factor in driving contracting parties. Thus, the very voluntariness on which contracts are based should be viewed as a spectrum that cannot be reduced to dichotomous options. This understanding limits the role of contract law in securing autonomous choice, and carves out space for other regulatory measures to achieve this.

Gregory Klass further suggests that, while it is important to acknowledge the choices given to autonomous parties in setting the first-order terms of their transactions, theorists should not neglect second-order terms that construct the mechanisms available to contracting parties. Klass illustrates this argument by analyzing the parol evidence rule. First, he explains why this rule is an

independent rule of law and why is it important to acknowledge it. Second, he argues that it should be implemented differently according to transaction type — that is, in negotiated contracts between firms and consumer contracts — to accommodate the parties' capacities for choice. In arguing this, Klass highlights the centrality of the mechanisms of choice in designing different contracts for different contexts.

Oren Bar-Gill and Clayton Gillette present the third Article in the segment on *Choice*. They engage with the issue of choice by focusing on the question of how to achieve an optimal number of contract types, examining whether the market can indeed produce the optimal number. They suggest that standard market failures such as externalities, monopolistic power, and imperfect information might prevent the optimal number of contract types from being achieved, and accordingly discuss the state's role in solving these market failures. Similarly, they find that the government will generally undersupply or oversupply contract types, resulting in a general failure to achieve the optimal amount, even though, in appropriate cases, soft, nudge-type government interventions may be desirable. Thus, Bar-Gill and Gillette raise some important doubts regarding the merits of a theory that is focused on contract types.

Roy Kreitner brings the second segment to a close with his Article "Money Talks." For Kreitner, participation in markets, via contracts, is usually framed as a question of exit — a choice as to whether to participate at all. Kreitner argues that some markets can enable participation by voice, and illustrates this possibility in the context of institutional investment and investors' pursuit of commitments to non-financial goals. Building on this discussion, Kreitner argues that enhancing voice may advance self-governance through contracts.

Peter Benson begins the final segment of the issue, *Contract*. Benson argues that both unity and multiplicity are evident in modern contract law: it provides principles for all contracts and at the same times specifies further principles and rules for particular instances. Thus, a viable theory of contract should provide an account of the two aspects. Benson further argues that choice theory is a novel attempt at such account, but that it may fail to define a general conception of contractual relations that takes into account both their coercive character and the liberal conception of reasonableness. As an alternative, Benson elaborates on the vitality of the transfer conception of contracts, and discusses the multiplicity of contract types. Unlike Dagan and Heller, Benson takes a rights-based approach, rather than a teleological one. And this, Benson argues, is power-conferring, as well as duty-imposing.

Daniel Markovits and Alan Schwartz close the third and final segment of this issue. Markovits and Schwartz argue that value pluralism is fundamental to private law, and provide a taxonomy of the theoretical approaches to this issue: capitulating to, leveraging, and embracing value pluralism. In their discussion

of the approaches, Markovits and Schwartz delve into the shortcomings of each approach, and provide a rich discussion of the problems of embracing value pluralism by discussing Dagan and Heller's approach.

Dagan and Heller then round off this issue by replying to critics. They refine the concept of *Freedom* by highlighting the distance between autonomy and independence, and explaining why choice theory respects the liberal commitment to toleration and is not overly-perfectionist. They then turn to the issue of *Choice*, claiming that choice theory's approach to multiplicity can be implemented by existing legal actors and is, furthermore, conducive to justice. Finally, they address *Contracts* and in particular contract law. Dagan and Heller argue that the commitment of reciprocal respect to self-determination — which stands at the core of their liberal idea of contract — advances contract law to a form of pluralism that is principled, structured, and informed. They conclude by showing how critiques, including those published in this issue, helped them advance choice theory.

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