

Contract Law and the Liberalism of Fear

*Nathan B. Oman**

*Liberalism's concern with human freedom seems related to contractual freedom and thus contract law. There are, however, many strands of liberal thought and which of them best justifies contract is a difficult question. In *The Choice Theory of Contracts*, Hanoch Dagan and Michael Heller offer a vision of contract based on autonomy. Drawing on the work of Joseph Raz, they argue that extending autonomy should be the law's primary concern, which requires that we extend the range of contractual choices available. While there is much to admire in their work, I argue that autonomy as conceived by Dagan and Heller cannot justify contract law. First, there are reasons to doubt the coherence of autonomy as an ideal. Second, given the pluralism of liberal societies, which, for example, often include substantial numbers of religious believers who reject core assumptions of autonomy theory, it is doubtful that such a theory can legitimate contract law. A more modest version of liberalism concerned primarily with protection against cruelty and providing a *modus vivendi* in pluralistic societies is more tenable. Such a vision of liberalism yields a more modest vision of contract law. Rather than making it into another means of realizing the dream of a more autonomous self, it is enough that contract law facilitates commerce and the marketplace. Markets in turn can serve an important — albeit limited — role in sustaining the peaceful cooperation and coexistence toward which a more realistic liberalism should aim.*

* Rita Ann Rollins Professor, William & Mary Law School. I presented an earlier draft of this paper at a conference on “Freedom, Choice, and Contract” at Columbia Law School, where I benefited from the responses of the participants. Hanoch Dagan was particularly generous and helpful in his comments. I am also grateful for criticisms of an earlier draft from Brian Bix, Evan Criddle, and James Stern. As always, I thank Heather.

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INTRODUCTION

There is a long association of contract law with liberal political theory. John Locke and Thomas Hobbes famously grounded the legitimacy of the state itself in an original social contract.¹ On this view, all law is in some sense contractual, and all legal obligations can be traced back to an original contract. The state of nature and an original social contract are, of course, fictitious. However, the recognition of this fact hasn't eliminated contract from theories of liberalism. Most famously, in *A Theory of Justice*, John Rawls posits a hypothetical original position where the agreement of the parties yields principles of political justice.² Ironically, given this long history of association, liberal political theorists are often uninterested in and apparently ignorant of private law in general and contract law in particular. Thus Rawls, haunted by the specter of laissez-faire capitalism, insisted that the law of property and contract are not part of the "basic structure" to which the principles of justice apply.³ The same is not true of legal scholars. Theorists of contract law have long been attracted to liberal political theories as a possible source for the normative foundations of contract law.⁴ Thus, contract law theory abounds with arguments that invoke the language of rights, liberty, autonomy, and consent familiar from liberal political theory.

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- 1 *See generally* JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* (Peter Luslett, 1988) (1690) (offering a social contract theory of political obligation); THOMAS HOBBS, *HOBBS: LEVIATHAN: REVISED STUDENT EDITION* (Richard Tuck ed., 1996) (1651) (same).
 - 2 Rawls was also critiqued in contractualist terms, with Ronald Dworkin noting that a hypothetical contract was no contract at all. *See* Ronald Dworkin, *The Original Position*, in *READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE* 16–52 (Norman Daniels ed., 1989).
 - 3 *See* JOHN RAWLS, *A THEORY OF JUSTICE* 54 (rev. ed. 1999) ("Of course, liberties not on the list, for example, the right to own certain kinds of property (*e.g.*, means of production) and freedom of contract as understood by the doctrine of laissez-faire are not basic; and so they are not protected by the priority of the first principle.").
 - 4 *See generally* STEPHEN A. SMITH, *CONTRACT THEORY* (2004) (providing an exhaustive summary of rights-based theories of contract law); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* (1981) (offering a liberal theory of contract based on promising); DORI KIMEL, *FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT* (2003) (offering a liberal theory of contract based on a different theory of promising).

In *The Choice Theory of Contracts* (CTC),⁵ Hanoch Dagan and Michael Heller write in this tradition, offering a novel theory of contract law that grounds its normative foundations in a robust political morality centered on the ideal of human autonomy. CTC takes its normative bearings from the perfectionist liberalism of Joseph Raz, which sees the primary purpose and duty of the state in terms of expanding the menu of choices available to citizens. By placing autonomy at the center of normative analysis, the menu of choices becomes in some sense morally prior to any of the ends that might be pursued by particular choices. The implications of this stance are elegantly articulated by CTC. The result is a vision of contract law that is both more imperialistic — large swaths of legal doctrine often not thought of as primarily contractual now become part of “contract law” — while at the same time more diverse and less unified in terms of its doctrinal structure.

Autonomy, however, is by no means the only basis for allegiance to a liberal political order. Indeed, we have good reasons to doubt both its theoretical and practical attractions. There are less normatively ambitious visions of liberalism that are worth considering.⁶ On this view, the purpose of liberal political institutions is not to maximize individual autonomy. Indeed, one need not accept human autonomy as a moral desideratum *per se* to defend liberalism. Rather, the virtue of a liberal society is that given certain historical conditions it provides the best hope for peaceful coexistence among those with deeply felt — and often deeply illiberal — moral commitments. This less ambitious vision of liberalism also has implications for contract doctrine. In particular, it supports a more modest vision of contract law, one that properly places market transactions at the center of legal doctrine.⁷ As for the new domains brought within the gambit of contract law theory by CTC, a less ambitious liberalism would be far more content to see these areas of law as

5 HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017) [hereinafter CTC].

6 See, e.g., Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21 (Nancy L. Rosenblum ed., 1989) (arguing that liberalism is justified by the need to avoid cruelty by the government); DAVID MCCABE, *MODUS VIVENDI LIBERALISM: THEORY AND PRACTICE* (2010) (arguing that liberalism is justified because it provides a *modus vivendi* for those with otherwise incommensurable moral beliefs).

7 See generally NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016) (arguing that markets support a liberal society in which those with deep moral disagreements can live peacefully together and that contract law should be seen as primarily about supporting such markets).

ad hoc accommodations to social realities rather than special incarnations of an overarching and almost all-encompassing vision of autonomy and contract.

This Article proceeds as follows: Part I provides a brief summary of the argument advanced in CTC. This is the most sophisticated autonomy theory of contract that has yet been offered. Part II offers reasons why autonomy cannot ultimately do the work to which it is put in this theory. Political and legal institutions must in theory be justifiable to those over whom they claim authority. Autonomy theory, however, does not fully appreciate the depth of moral disagreement present in liberal societies. When alternative moral stances, such as those informed by monotheistic religions, are seriously considered, the assumptions of autonomy theory are revealed as too deeply contestable to provide a justification for legal and political institutions. Part III explores alternative justifications for liberal political and legal institutions. In place of ambitious theories of personal autonomy, the justification for such institutions lies in their ability to mediate the peaceful coexistence of those with incommensurable moral commitments. One of these mediating institutions is the market, which provides a mechanism of cooperation in the face of moral pluralism. Within this approach to liberalism, the purpose of contract is not to foster autonomy but to foster commerce. This, in turn, means that contrary to CTC, marriage and other noncommercial subjects ought not to be brought within the gambit of contract law.

I. AUTONOMY, LIBERALISM, AND CONTRACT

One possible definition of liberalism is a political philosophy that places human freedom at the center of its normative orientation toward civic life. According to one popular and plausible history of liberalism, liberal political institutions find their origins in the aftermath of the seventeenth-century wars of religion.⁸ On this view liberalism represents a retreat from more ambitious forms of politics grounded in religious confessions that tied the state to a complete vision of human existence and salvation. These efforts, so goes the traditional story, were abandoned in the interests of religious peace. However, the dominant strand of modern liberalism has greater ambitions than the mere peaceful coexistence of differing religious groups. Rather, it rests on a conception of human beings that sees them primarily as choosers. As the point

8 See, e.g., MARTHA CRAVEN NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 34 (2008) ("The first half of the seventeenth century saw bloody explosions of religious violence in both Britain and continental Europe. Most American colonists came to the New World in flight from religious persecution.").

is often made by liberal political philosophers, individuals should be free to choose their own conception of the good life and to pursue it.⁹ It is possible to understand this injunction in purely political terms, as a pragmatic stance towards the scope of political power and legitimacy. However, many liberal philosophers take the point to have a deeper significance. For these thinkers, human flourishing requires that any good life be a life that in some sense that person can claim to have authored him- or herself. In other words, what makes a particular conception of the good proper for a person lies less in the substantive content of that conception than in the fact that it was chosen by that person. This is a view of liberalism that places at its center a strong vision of autonomous individuals authoring and choosing their own conception of what constitutes a good life.

Within liberalisms that place at their center human freedom, there is a vicious family debate between those that see freedom primarily in terms of independence and those who conceptualize freedom as primarily a matter of individual autonomy.¹⁰ The view that prioritizes independence is most closely associated with libertarian theorists such as Robert Nozick.¹¹ On this view the heart of freedom lies in the absence of outside coercion and restraint. The goal of liberal political institutions should be to limit the reach of the state and suppress force and fraud by private parties in human relationships.¹² Non-libertarian liberals, however, have been deeply critical of this stance, some going so far as to deny that libertarianism is a legitimate member of the liberal family.¹³ For autonomy theorists, mere independence is insufficient to secure meaningful freedom for individuals. Rather, those individuals must be endowed with sufficient material, intellectual, and social resources to craft

9 See, e.g., John Rawls, *The Priority of Right and Ideas of the Good*, 17 PHIL. & PUB. AFF. 251 (1988) (arguing that the state should protect individuals in their rights but not impose on them a comprehensive vision of the good).

10 See CTC, *supra* note 5, at 41-45 (discussing the distinction between independence and autonomy).

11 See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (2d ed. 2013) (arguing for a minimalist state).

12 See, e.g., RICHARD A. EPSTEIN, *SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM* 46 (2003) (“No society can afford to allow a tiny fraction of its population to compel the rest of the population to live in fear, so these twin prohibitions against force fraud become the bedrock principle on which all legal systems rest, the obvious source of the priority of what Isaiah Berlin (not quite accurately) called ‘negative liberty.’”).

13 See generally Samuel Freeman, *Illiberal Libertarians: Why Libertarianism is not a Liberal View*, 30 PHIL. & PUB. AFF. 105 (2001) (attacking the liberal bona fides of libertarian theories).

for themselves meaningful lives and a meaningful account of the good life. One way of thinking about the difference between autonomy liberalism and independence liberalism is in terms of what we might call the conditions of autonomy. For libertarian-minded theorists, the conditions of autonomy are relatively narrow. It is enough that choices be free of fraud or coercion. On the other hand, for autonomy theorists the conditions for autonomy are more generous. Hence, philosophers such as Joseph Raz have argued that the state has an obligation to make available to its citizens a meaningful array of life options.¹⁴

CTC lies firmly within this autonomy tradition of liberalism.¹⁵ According to CTC, our goal should be to maximize human freedom. This requires first that, subject to important exceptions, the state not coerce its citizens and that it protect them from the coercion of others. Such independence, however, is not enough. The ability to exercise choice is meaningless if there is a limited array of options from which to choose. This is true even if most of the options on the menu hold little or no appeal to the chooser.¹⁶ The savor of the dish chosen, according to CTC, is improved by a knowledge of and opportunity to choose a different dish, preferably many different dishes. Thus the state has an affirmative obligation to generate a menu of options from which to choose. Crucially, autonomy is prior to any of the goods offered by particular options. Autonomy is not a means by which other goods are achieved.¹⁷ Rather, CTC insists that such goods are valuable because they generate an autonomy-expanding range of options. The menu at the restaurant is not a means of getting a good meal. Rather, the range of good meals offered by the restaurant exists in order to create the menu. The act of choosing and ordering the meal is given priority over the experience of eating it or the quality of the food.

14 See generally JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1988) (setting forth a comprehensive defense of an autonomy-based political morality).

15 See CTC, *supra* note 5, at 68 (“[W]e develop two points from Raz’s political philosophy with particular usefulness for contract theory: (1) to be free, individuals need meaningful choice and (2) states have a necessary role in supporting the availability of valuable options.”).

16 See *Id.* at 103 (“The importance of this ... point cannot be overstated. Having stable and normatively attractive forms available to reject makes one’s chosen contract type even more of an expression of individual autonomy.”).

17 *Id.* at 68 (“The key to understanding contractual autonomy is to see it ... as a good that needs to be fostered. But what does that imperative mean in the context of our diverse world of contracting practices? Answering this question is what leads to choice theory. In a sentence, we foster the good of contractual autonomy by ensuring freedom of contracts – that is, by supporting adequate availability of choice among types.”).

This model of autonomy has a number of implications for contract law. The first can be thought of as a reversal of Henry Maine's dictum about the passage from status to contract. By status he meant a set of legal obligations attached to a particular role, an off-the-rack set of rights and duties authored by society. Contract, in turn, consists of obligations authored in their entirety by the parties. "We may say," he wrote, "that the movement of the progressive societies has hitherto been a movement from Status to Contract."¹⁸ On this view something like Samuel Williston's abstract doctrinal structure, which sought an ideal where the law of contracts had virtually no substantive content beyond that provided by the parties, was the ideal of contract.¹⁹ In Maine's formulation status is a primitive, less free and liberal form of social organization, while the advent of an abstract and general law of contract marks the advent of a free society.²⁰

CTC is sharply critical of the Willistonian formulation, but not for the reasons that have been common among contract scholars since its final synthesis in the opening decades of the twentieth century.²¹ Williston has generally been derided — perhaps unfairly — for his formalism.²² This is the heart of the *Restatement (Second) of Contracts*' criticisms of the first *Restatement*, which was largely authored by Williston, who served as the first *Restatement's* reporter.²³ Hence, for example, the Second Restatement relaxed the formalism of the First Restatement's preexisting duty rules, taking a more relaxed stance toward contractual modifications.²⁴ Likewise, the

18 See HENRY SUMNER MAINE, *ANCIENT LAW* 165 (Frederick Pollock & Raymond Firth eds., 1963).

19 See CTC, *supra* note 5, at 7-9 (summarizing what it calls the "Willistonian constraint" in contract law).

20 See Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry too Much About Boilerplate and Other Puzzles*, 83 *BROOK. L. REV.* 215, 224-25 (2017) (discussing the background of Maine's theory).

21 See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* 72-73 (The Storrs Lectures ed. 1979) (discussing the formalist, "Langdellian" nature of Williston's scholarship on contracts); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685, 1697-98 (1976) (criticizing Williston's formalism as overly technical and confused).

22 See generally Mark L. Movsesian, *Rediscovering Williston*, 62 *WASH. & LEE L. REV.* 207 (2005) (arguing that Williston has been unfairly attacked as a mindless formalist).

23 See *RESTATEMENT (SECOND) OF CONTRACTS* (AM. LAW INST. 1981) (offering a synthesis of mid-twentieth century neoclassical contract doctrine).

24 Compare *Id.* §89 (setting forth the rule on contract modifications) with *RESTATEMENT OF CONTRACTS* §84 (AM. LAW INST. 1932) (setting forth the preexisting duty rule).

Second Restatement broadened standard-like contractual defenses, borrowing the doctrine of unconscionability from the Uniform Commercial Code.²⁵ Alternatively, Williston was attacked by Grant Gilmore and later the critical legal studies movement as part of a broader attack on individualism and free-market economics, with which they associated him.²⁶ Today these criticisms from a generation ago feel dated. Law and economics scholars have mounted a largely successful defense of more formalist approaches to contract law, at least in business-to-business contracts.²⁷ CTC, however, offers a novel critique of the Willistonian synthesis. The problem is that it mistakes a part of contracting — commercial contracts — for the whole. On this view, a menu of status-like relations — off-the-rack bundles of rights and duties variable to a greater or lesser extent by agreement — enhances autonomy by increasing options.²⁸ Far from representing a vestige of anachronistic, pre-liberal thought, they represent an increase in personal autonomy. Indeed the profusion of such options is central to autonomy, so central that in many situations the state has an obligation to create such statuses in order to enhance choice.²⁹

One result of CTC's move to place autonomy at the center of contract law is that areas of law that have traditionally been assumed to be outside of contract now become part of the law that CTC purports to explain. Consider family law, which CTC unapologetically treats marriage as part of contract

25 Compare RESTATEMENT (SECOND) OF CONTRACTS §208 (AM. LAW INST. 1981) (setting forth the defense of unconscionability) with U.C.C. §2-302 (AM. LAW INST. & UNIF. LAW COMM'N 2003) (same).

26 See GILMORE, *supra* note 21, at 72–73 (discussing the formalist, “Langdellian” nature of Williston’s scholarship on contracts); Kennedy, *supra* note 21, at 1697–98 (criticizing Williston’s formalism as overly technical and confused).

27 See, e.g., Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541 (2003) (arguing that in firm-to-firm contracts courts should formalistically apply a hard-edged version of the parol evidence rule).

28 See CTC, *supra* note 5, at 103.

29 Writing in the early 20th century, Nathan Isaacs argued that the rise of boilerplate contracts represented a reversal of Maine’s progress from status to contract, with private actors now authoring the obligations associated with each status. See generally Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917) (discussing contracts of adhesion as a reversal of Maine’s progression, with contract giving way to status). CTC more or less embraces this point, but sees it as advancing personal autonomy through the private authorship of new contract types. See *Id.* at 115 (“legal entrepreneurs see value from one-off creation of new forms that are then standardized, replicated, and sometimes codified as discrete types.”).

law. In CTC's conceptualization, marriage exists to further autonomy. To be sure, marriage provides goods such as love, companionship, support, an environment for child-rearing and the like, a set of concerns that CTC would broadly conceptualize under the heading of "community."³⁰ Some of these goods might be contingent on the voluntary nature of the relationship. One might believe that love cannot arise out of an unchosen or involuntary relationship.³¹ However, according to CTC, autonomy in marital decisions is not a means to these ends. Rather, the availability of a marital option that allows for love, companionship, and joint child-rearing is valuable because it enhances our autonomy. This means that alternatives to traditional forms of heterosexual marriage, such as cohabitation, are valuable because they enhance our autonomy.³² Likewise, "utopian" models of marriage such as covenant marriage or open marriage also enhance the autonomy of all.³³ Their availability broadens the range of our choices even if they aren't chosen.

The limits of autonomy theory, however, can be seen in the difficulty of using CTC to account for the most dramatic recent innovation in this area: the rise of same-sex marriage. Autonomy as conceptualized by CTC was not central to the arguments that resulted in the success of same-sex marriage. The demand for legal recognition was not primarily grounded in autonomy.³⁴

30 See CTC, *supra* note 5, at 60 (discussing marriage in terms of a contract that foster's "thick community").

31 This claim is doubtful especially outside the relatively recent invention of romantic love and companionate marriage. Children love parents whom they do not choose, and many cultures have arranged marriages involving varying levels of choice by the bride and groom. Love frequently arises in such relationships, despite their not having been fully voluntary according to Western norms. The logic of such relationships is captured in song in an exchange between Tevye and Golde in *Fiddler on the Roof*:

(Golde)
 Do I love him?
 For twenty-five years I've lived with him
 Fought with him, starved with him
 For twenty-five years my bed is his
 If that's not love, what is?

JERRY BOCK, *FIDDLER ON THE ROOF* (2011).

32 See CTC, *supra* note 5, at 121-22 (discussing the autonomy-enhancing role of alternative family arrangements).

33 See CTC, *supra* note 5, at 119-20 ("This approach is relevant to the 'horizontal' dimension of alternatives to conventional marriage – such as cohabitation, civil unions, and covenant marriage.").

34 It's also worth noting that the arguments in opposition to same-sex marriage were largely orthogonal to questions of autonomy. For many religious traditionalists,

Indeed, key to the success of the LGBT rights movement is the recognition that sexual orientation is not a choice. Gays and lesbians should not be seen as sexual perverts wrongfully rejecting traditional models of heterosexuality. Rather, homosexual desires, like heterosexual desires, are innate.

The quest for same-sex marriage thus responded to two impulses: The first was the recognition that gay and lesbian couples form lasting monogamous unions to pursue the same kinds of goods — erotic attachment, companionship, support, and child-rearing — pursued by opposite sex couples.³⁵ This was not primarily an appeal to the requirements of autonomy. Gays and lesbians deny that their sexual orientation is a choice. Likewise, the appeal of same-sex marriage was not that it would create a new choice, but rather that it would accommodate an already existing social practice in a more humane way. The law should recognize these facts and eliminate the host of legal burdens — great and petty — faced by same-sex couples. The second impulse was the desire for recognition.³⁶ Despite the sexual revolution and the decline of taboos against premarital sex and cohabitation, marriage remains the preeminent way in which society validates romantic unions. It was thus understandable that recognition of the innateness of sexual orientation and the rejection of the view that homosexuality is a perverse choice were coupled with the desire

marriage is a primary human relationship that responds to the creation of human beings as embodied men and women by God. *See* Andrew Koppelman, *Gay Rights, Religious Accommodations, and the Purposes of Antidiscrimination Law*, 88 SOUTHERN CAL. L. REV. 619, 625-26 (2015) (discussing the views of marriage held by religious traditionalists); Rod Dreher, *Sex After Christianity*, AM. CONSERVATIVE (Aug. 16, 2017), <http://www.theamericanconservative.com/articles/sex-after-christianity>. This traditionalist view of marriage has, of course, been rejected in American law and many other nations in favor of a view of marriage that includes same-sex couples. *See* Obergefell v. Hodges, 576 U.S. (2015) (holding that same-sex couples have a constitutional right to marry under the laws of the United States).

35 *See, e.g.*, JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2d ed. 2005) (arguing that same-sex unions pursue the same set of goods as opposite-sex unions).

36 *See, e.g.*, *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012) *vacated by* *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (invalidating Proposition 8 as unconstitutional, in part because it took away the “status and dignity of marriage” for same-sex couples); Nan D. Hunter, *The Future Impact of Same-Sex Marriage: More Questions than Answers*, 100 GEO. L.J. 1855, 1997 (2012) (“there is the symbolic significance of relationship recognition — and, in particular, of marriage equality — because it places gay and lesbian couples on an equal footing with all other married couples, according them the same ‘status and dignity’ as other couples through public recognition of their relationships.”).

that same-sex unions be accorded legal recognition as marriages. Tellingly, neither of these impulses arise out of a need to create a longer menu of marital options in order to enhance individual autonomy. Rather, they arise from needs and desires that are essentially orthogonal to autonomy. This awkwardness at the theoretical edge of CTC points toward a deeper problem: the difficulty of defending legal institutions in general, and liberal institutions in particular, using autonomy.

II. LIBERALISM WITHOUT AUTONOMY

I am unpersuaded that autonomy can generate either practical or theoretical legitimacy for political and legal institutions. Accordingly, this section argues that autonomy cannot provide an adequate theory of contract law. CTC relies on the autonomy-based argument for liberalism put forward by Joseph Raz. This section suggests some reasons for doubting the ability of autonomy to do the justificatory work to which Raz and CTC put it. In particular, autonomy-based arguments rest on highly contestable moral premises that are rejected by many reasonable citizens. The examples here are drawn mainly from religious beliefs. My point is not to offer a theological critique of the Razian position or argue that theological arguments standing alone can legitimate political and legal institutions. Rather, I am making the more modest point that religious believers often reject some of the key moral assumptions on which autonomy theory rests. These beliefs must be taken seriously by any theory that purports to justify the authority of political or legal institutions over such people. Political authority must be justified in terms that can be accepted by all of those who are members of the political community, and it is both a theoretical and practical mistake to assume that there is a moral consensus around the assumptions of autonomy theories, even when such assumptions may seem self-evident. They are not.

Fortunately, this does not mean that liberal institutions cannot be justified. However, they can only be justified by less morally ambitious theories. On this view, liberal institutions — including contract law — are legitimate because they provide mechanisms for peaceful coexistence in societies riven by deep moral disagreements. By jettisoning autonomy as a foundation, liberalism can rest on more modest and thus more widely acceptable premises.

A. Problems with Autonomy Theories of Liberalism

CTC is based on a theory of autonomy drawn from the work of Joseph Raz.³⁷ However, there are reasons to doubt whether a Razian notion of autonomy can justify contract law. We have good reasons to believe that reasonable people can reject the notion of autonomy advanced by Raz and that as a practical matter there are many people who would in fact reject the theory. This raises difficulties for any theory of law that rests on a Razian notion of autonomy. It is by no means clear that an autonomy-advancing body of law can legitimately claim authority over those who reject autonomy as a proper political goal. In the discussion that follows I draw repeatedly on ideas from monotheistic theologies. My aim in doing so is not to make any point about theology or religion *per se*. Rather, I draw on religion because these faiths are widely accepted and vigorous moral traditions. They provide an important corrective to a certain kind of philosophical intuition mongering that builds theories on premises that appear stronger than they in fact are merely because they are widely accepted among those who construct political and legal theories. There are more things in heaven and earth than are dreamt of in our philosophies, and it is useful to be reminded that there is greater diversity of reasonable beliefs and moral assumptions in our societies than our theories at times assume. This does not mean that one can legitimately ground legal institutions in purely theological beliefs, but the justification of such institutions cannot rest on arguments that fail to grapple with the very different moral assumptions that animate the lives of many citizens.

There are several features that make Raz's notion of autonomy problematic. The first is its humanism. Raz writes: "To simplify the discussion I will endorse right away the humanistic principle which claims that the explanation and justification of the goodness or badness of anything derives ultimately from its contribution, actual or possible, to human life and its quality."³⁸ Stated in these terms, humanism seems unobjectionable, but it is unlikely that it could command universal and perhaps even widespread acceptance outside of fairly narrow circles in advanced liberal democracies. This is because most religious believers are willing to entertain the possibility that there are moral principles whose validity does not rest on their contribution to the quality of human life. To be sure, there are theologies that place human wellbeing at the center of God's purposes.³⁹ However, many religious believers place God rather than

37 See CTC, *supra* note 5, at 68-69 (discussing CTC's debt to Razian theories of autonomy and liberalism).

38 RAZ, *supra* note 14, at 194.

39 For example, Mormon scripture insists that God's primary purpose focuses on humanity. "For behold, this is my work and my glory — to bring to pass the

humanity at the center of morality, and some of those theologies are likely to insist that the morality of at least some actions lies not in their contributions to human life but rather in taking a proper stance toward God. Hence, an action might be good or bad not because it looks to human flourishing but because it glorifies God or marks submission to him. Of course, such believers are likely to endorse humanism as a basis for many moral obligations, but it cannot be assumed to be the sole basis of their morality. Furthermore, the advance of secularization in Western societies cannot be taken as a reason for ignoring such theologically based moral beliefs. As Charles Taylor has exhaustively documented, modern secularization is not a matter of subtracting religion from moral, intellectual, and social life.⁴⁰ Rather, the secularization we observe in advanced liberal democracies consists of a world in which both belief and unbelief are live possibilities, rather than a world in which belief has been rendered irrelevant.

The second problematic feature of Raz's notion of autonomy is the particular stance towards the self that it demands. Again, religious traditions point toward the basic contestability of this stance. He writes, "to be autonomous one must identify with one's choices, and one must be loyal to them."⁴¹ This loyalty to the self and its choices, however, is far from a universally accepted moral stance. It is not even clear that it is a particularly common moral stance. For many people, morality consists not in the affirmation of the self but rather in forgetfulness of the self. This can be seen in extreme, ascetic moralities, but it would be a mistake to imagine that skepticism about the affirmation of self is confined to exotic or esoteric moral systems. Christianity, which remains a vital moral force in the lives of billions of people, teaches "for whosoever shall save his life shall lose it: and whosoever will lose his life for my [*i.e.* Jesus Christ's] sake shall find it."⁴² Raz also writes "A person who feels driven by forces which he disowns but cannot control, who hates or detests the desires which motivates him or the aims that he is pursuing, does not lead an autonomous life."⁴³ This, however, could just as easily be a description of the moral lives of many — if not most — people. Our actual moral decisions are often beset with *akrasia*, anxiety, and regret. Indeed, one

immortality and eternal life of man," says God in one Latter-day Saint text, *Moses* 1:39. Another goes on to suggest that "men are, that they might have joy" 2 *Nephi* 2:25.

40 See *e.g.*, CHARLES TAYLOR, *A SECULAR AGE* (2007) (providing an exhaustive account of the origins and structure of modern secularity).

41 RAZ, *supra* note 14, at 382.

42 *Matthew* 16:25 (King James Bible).

43 RAZ, *supra* note 14, at 382.

can think of the struggle with one's own perverse desires as one of the central moral quandaries that human beings face. Again, religion often points toward a moral stance very much at odds with the self-affirmation upon which this idea of autonomy seems to be based. Protestants, for example, emphasize the fallenness of human nature and take the depravity of human desires as the primary frame for moral deliberation.⁴⁴

The third problem is Raz's insistence that autonomy requires independence. This means the choices must be freely made. Choices must not only be free of coercion but must also be free of manipulation. What Raz means by manipulation, however, is not entirely clear. "Manipulation, unlike coercion, does not interfere with a person's options. Instead it perverts the way that a person reaches decisions, forms preferences or adopts goals. It too is an invasion of autonomy whose severity exceeds the importance of the distortion it causes."⁴⁵ This formulation seems to imagine that there is a condition in which individual choices are not invaded by outside influences. At the very least, it seems that we must imagine the self as an autonomous chooser that approaches the question of living the good life in terms of choosing the moral vision that will guide that life. This choice must be uninfected by the manipulating force of history, circumstances, or the pressure of others.

Aristotle famously argued that outside of the context of the polis, a man was either a god or a monster, but he could not be a human being.⁴⁶ If one abstracts this claim beyond the Greek chauvinism that often infects Aristotle's analysis, he is making an important claim about human agency.⁴⁷ Autonomy theory takes the independent adult as the paradigmatic case of humanity. This autonomous adult then fearlessly authors his or her own life by choosing the vision of the good — the moral script — that will govern that life. This choosing self, however, can't just miraculously appear. Identity is ultimately grown, not chosen. Childhood, circumstances, and biology all have their claims on the self. We are born into communities that have their own visions of the good, visions that we lack the ability to choose until long after they have left

44 See, e.g., JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* II 1-2 (John T. McNeill ed., Ford L. Battles trans., 1960) (discussing the human struggle with original sin).

45 RAZ, *supra* note 14, at 377-78.

46 See ARISTOTLE, *ARISTOTLE'S POLITICS* 1253a (Carnes Lord trans., 2d ed. 2013) (c. 350 B.C.E.) (discussing the relationship between human nature and community and the identity of man outside of the polis).

47 See ALASDAIR C. MACINTYRE, *A SHORT HISTORY OF ETHICS: A HISTORY OF MORAL PHILOSOPHY FROM THE HOMERIC AGE TO THE 20TH CENTURY* 123 (2006) (noting that Aristotle tended to uncritically identify the life of an ancient Athenian aristocrat with the highest form of human life).

indelible marks on the self. The same is true of families, schools, and the other institutions that take the exquisitely vulnerable life that is an infant and gradually transform it into an adult. By the time that the independent self of autonomy theory emerges it lacks the capacity to choose in a way that isn't already infected by a lifetime of unchosen commitments and influences. This doesn't mean that choice is unimportant, but it does mean that we cannot ground its importance in a myth of the self-authoring self. There is no such thing as an autonomous self in this sense. We are always manipulated.

One might object that this is to cast the idea of manipulation in unduly rigid or extreme terms. Perhaps. Few proponents of autonomy would deny the reality of childhood and the impact of history and community on the development of the self. However, simply acknowledging these facts does not eliminate the theoretical difficulty if one's theory fails to account for their importance. It is not clear from Raz's writings how his concern for manipulation is to be reconciled with the reality of how our choices are pervasively infected with outside influences. One might argue that we are always manipulated by our own histories and communities, but not all forms of manipulation are created equal. Some are pernicious and others are relatively benign. This is surely true. A theory such as Raz's, however, commits us to drawing that distinction in terms of getting closer to autonomy's ideal of an unconditioned self that chooses free of outside influences. This ideal, however, is not only unachievable in practice, but of dubious coherence. History, family, community, institutions, and the like are not unfortunate and perhaps unavoidable threats to the self. They are, as Aristotle suggests, the preconditions for any coherent identity at all. Furthermore, there is no reason why the distinction between legitimate and illegitimate influences must be drawn in terms of the ideal of autonomy. Coercion, fraud, and other forms of pernicious manipulation might be objected to on the ground of utility or as failures to love one's neighbor, to take two very different normative frameworks. Whatever their other deficiencies, these frameworks have the attraction of not requiring that we take the unconditioned self as an ideal.

Can the concept of autonomy be used to justify bodies of law that claim authority over those that reject many of the assumptions on which a belief in autonomy rests? Raz offers what he calls the "normal justification thesis" under which authority is justified if "a person is more likely to act successfully for reasons which apply to him than if he does not subject himself to its authority."⁴⁸ In other words, authority purports to offer a reason to an agent for acting or refraining from acting. It can only do so, however, when following authority advances reasons that the agent already has for acting. If an agent

48 RAZ, *supra* note 14, at 71.

rejects the desirability and the coherence of autonomy, however, then it is difficult to see why the concept of autonomy offers him a reason for action. Of course, there might be other reasons that justify the authority of an autonomy-advancing body of law of the kind envisioned by CTC, but autonomy itself isn't among them.

For example, one might fall back on arguments based on consent. Raz himself expresses skepticism about what he calls "inflationary" theories of consent, by which he seems to mean traditional social contract theories that posit universal consent to the law.⁴⁹ Rather, he offers an expressive theory of consent. He writes:

There are various attitudes towards society that consent to the authority of its laws can express. They can all be regarded as so many variations on a basic attitude of identification with the society, an attitude of belonging and of sharing in its collective life. Attitudes belonging to this family vary. They can be more or less intensive.⁵⁰

Hence, someone who rejects autonomy might be legitimately bound to an autonomy-enhancing body of law insofar as he consents to the law, consent itself being an expression of belonging and solidarity with the political community.

Placing autonomy at the center of the law, however, is likely to undermine the sense of belonging that would drive consent to the law's authority. Consider the position of member of a conservative religious community that largely rejects the presuppositions of autonomy theories. Raz argues that in principle it is permissible to use coercion to break up such communities, but "a test of viability is the most important consideration in determining policy towards such groups."⁵¹ In practice, such groups must be tolerated because their suppression would be unreasonably difficult in all but the most extreme cases. This is toleration, but, as Raz notes, "Typically a person is tolerant if and only if he suppresses a desire to cause another a harm or hurt which he thinks the other deserves."⁵² Such tolerance is a stance that is unlikely to breed attachment to the community rather than alienation from it. It is not the mutual toleration of a truly pluralistic regime, but one where the autonomy-pursuing authorities grant a limited dispensation to communities found to be ultimately unworthy of respect. Such tolerance sends the message that those communities are "outsiders, not full members of the political community."⁵³

49 *Id.* at 88-91.

50 *Id.* at 91.

51 *Id.* at 423.

52 *Id.* at 401-02.

53 *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring).

This doesn't mean that those who reject autonomy as an ideal should not be subject to the authority of the political community's laws. It does suggest it is unlikely that autonomy will provide a compelling defense of those laws.

B. Defenses of Liberalism without Autonomy

There is another kind of liberalism that does not place personal autonomy at the center of its political theory. Perhaps the starkest modern statement of this approach was given by Judith N. Shklar in her famous essay "The Liberalism of Fear."⁵⁴ Shklar's essay sounds what to some ears must seem a very pessimistic note. She points out that the liberal ideal has seldom been achieved in historical practice. However, her pessimism is also theoretical. She does not ground liberalism in a theory of human freedom and the need for personal autonomy in human flourishing. Nor does she insist that liberalism should be justified by reference to a set of pre-political, natural, or universal rights, as in the Declaration of Independence. Rather, she sees liberalism as primarily a response to the misery created by domination and cruelty. Hers is a political theory largely shorn of normative romance about human freedom. Rather, it focuses on the fact that "... fear and favor that have always inhibited freedom are overwhelmingly generated by governments, both formal and informal."⁵⁵ She concedes that "while the sources of social oppression are indeed numerous, none has the deadly effect of those who, as the agents of the modern state, have unique resources of physical might and persuasion at their disposal."⁵⁶

Shklar goes on to insist that while the liberalism of fear does not offer any theory about the *summum bonum* of political life, it does have a theory of the *summum malum*. "That evil is cruelty and the fear it inspires, and the very fear of fear itself."⁵⁷ Lest anyone mistake her meaning, she writes:

What is meant by cruelty here? It is the deliberate infliction of physical, and secondarily emotional, pain upon a weaker person or group by stronger ones in order to achieve some end, tangible or intangible, of the latter. It is not sadism, though sadistic individuals may flock to occupy positions of power that permit them to indulge their urges. But public cruelty is not an occasional personal inclination. It is made possible by differences in public power, and it is almost always built into the system of coercion upon which all governments have to rely

54 Shklar, *supra* note 6.

55 *Id.* at 21.

56 *Id.* at 21.

57 *Id.* at 29.

to fulfill their essential functions. A minimal level of fear is implied in any system of law, and the liberalism of fear does not dream of an end of public, coercive government. The fear it does want to prevent is that which is created by arbitrary, unexpected, unnecessary, and unlicensed acts of force and by habitual and pervasive acts of cruelty and torture performed by military, paramilitary, and police agents in any regime.⁵⁸

Her argument suggests that more perfectionist visions of liberalism, which place individual autonomy at the center of their theories, massively underestimate the fragility of liberal regimes and the pervasive risk of inhumanity. The focus of liberal theorizing, she insists, should be less ambitious and more attuned to the primal risk of cruelty in political life.

There are other versions of a modest liberalism that refuse to give pride of place to personal autonomy but which present a view of political life somewhat less dark and fraught than that offered by Shklar. Rather, they center on the value of peaceful coexistence in the absence of an overriding commitment to personal autonomy.⁵⁹ It is possible to defend liberal institutions and practices without grounding that defense in ideals of self-ownership and personal autonomy. For example, the John Rawls of *Political Liberalism* abandoned his earlier efforts to prove that all reasonable people would prioritize personal freedom over any particular vision that they might happen to hold about the shape of the good life.⁶⁰ Rather, he sought to defend liberalism by arguing that it could be supported by an “overlapping consensus” of reasonable comprehensive beliefs.⁶¹ Others have gone farther, insisting that liberal institutions and practices need not even reflect a limited convergence on normative principles as suggested by Rawls. Rather, a regime based on limited government and a broad sphere for private action can command de facto legitimacy as a *modus vivendi* among individuals and groups that may lack any deeper normative consensus.⁶² On this view, liberalism is not the end

58 *Id.* at 29.

59 *See, e.g.*, JOHN GRAY, *GRAY’S ANATOMY: SELECTED WRITINGS* (2009) (essays expressing skepticism of ambitious liberal philosophies); McCABE, *supra* note 6.

60 *Compare* JOHN RAWLS, *POLITICAL LIBERALISM* (1993) (arguing that principles of justice can be generated by a thin, shared public reason), *with* JOHN RAWLS, *A THEORY OF JUSTICE* (2005) (arguing that principles of justice result from choice and agreement in an “original position”).

61 *See* John Rawls, *The Idea of Public Reason Revisited*, 64 U. CHI. L. REV. 765, 765–807 (1997) (defending a limited idea of public reason); John Rawls, *The Domain of the Political and Overlapping Consensus*, 64 N.Y.U. L. REV. 233 (1989) (arguing for limited normative convergence in liberal principles of justice).

62 *See* McCABE, *supra* note 6.

of history nor need we claim that liberal institutions represent a universally valid commitment to personal autonomy. Instead, liberal institutions and practices are adaptive responses to the problems created in concrete historical circumstances, circumstances characterized by deep ethnic, cultural, sexual, religious, and moral pluralism.

The attraction of rejecting a liberalism grounded in a robust defense of personal autonomy can be seen by considering the justificatory requirements of liberal theory. Liberal theories must be able to justify themselves to those over whom liberal regimes claim authority. There are two reasons for this: the first is practical. Political legitimacy requires a broad base of minimal support. A regime that cannot claim the allegiance of broad swaths of its citizenry will likely either face instability or rely heavily on the coercive capacity of the state to enforce its will. Both options present problems. Political instability makes the private choice and planning envisioned by liberal regimes increasingly difficult. On the other hand, a heavy reliance on the coercive capacity of the state risks the kind of abuses and domination by the powerful that are generally regarded as political evils. Hence the need to offer reasons that are likely to be broadly acceptable to the citizens of liberal polities.

The second reason why liberal regimes must be justifiable to their citizens is theoretical rather than practical. Broadly speaking, liberalism is tied up with what we might call the Enlightenment Project. This is the insistence that political reasons be publically available and not rely on esoteric claims of authority grounded in tradition or mystery.⁶³ Jeremy Waldron put the point thus:

[T]he liberal insists that intelligible justifications in social and political life must be available in principle for everyone, for society is to be understood by the individual mind, not by the tradition or sense of the community. Its legitimacy and the basis of social obligation must be made out to each individual, once the mantle of mystery has been lifted, *everybody* is going to want an answer. If there is some individual to whom a justification cannot be given, and so far as he is concerned the social order had better be replaced by other arrangements, for the status quo has made out no claim to *his* allegiance.⁶⁴

This doesn't mean, of course, that liberal theories must be justified by arguments that everyone in fact finds persuasive. However, those arguments must rest on

63 See ROBERT AUDI, *RELIGIOUS COMMITMENT AND SECULAR REASON* 81-115 (2000) (setting forth the argument that citizens must make their public arguments in publically acceptable terms).

64 Jeremy Waldron, *Theoretical Foundations of Liberalism*, 37 *PHIL. Q.* 127, 135 (1987) (emphasis in the original).

premises that all citizens share. To rest the justification for such a regime on premises that many citizens reasonably — even if ultimately mistakenly — reject requires a retreat to appeals to special authority or the naked coercive capacity of the state.

The implications of this justificatory requirement can be seen by noting the deeply ambivalent status of personal autonomy in many important systems of belief. The center of many autonomy theories is a strong assumption of self-ownership. For this vision, it is self-evident that every individual has the ultimate moral authority over his or her own decisions and course of life. For many people in advanced democracies, particularly those socialized into a largely liberal and cosmopolitan point of view by institutions of higher education, the assumption of self-ownership seems unquestionable. However, in all likelihood it represents a minority position not only historically but also globally and perhaps even within advanced liberal democracies themselves. This is important because, as noted by Waldron, the legitimacy of liberal institutions rests on the possibility of justifying those institutions to those over whom they claim authority.⁶⁵ The views of citizens that reject the presuppositions of autonomy theory must count in such arguments. If many of the citizens toward whom these arguments are addressed reject the foundational assumptions of autonomy theories, then some other justification for legal institutions must be found.

Rejection of self-ownership might come from a variety of sources. In many cultures people regard themselves as claimed first by their families and communities rather than the self. The starkest challenge to the idea of self-ownership, however, comes from certain strands of monotheistic religion, which often conceptualizes human beings not as owners of themselves and authors of their own lives but rather as creatures of an all-powerful creator. To be sure, there are monotheistic thinkers who give pride of place to individual choice. Think of Soren Kierkegaard's existentialism.⁶⁶ However, such thinkers would likely deny that the purpose of religion is to provide another item on life's menu of choices. Rather, they would reverse the normative polarity of autonomy theory, insisting that choice is important because it is necessary to truly encounter God. More importantly, the negation of self before God is an important and recurring theme in monotheistic religion. Islam, for example,

65 See McCABE, *supra* note 6, at 5 (“The main idea here is that liberal theorists are committed to an account of political legitimacy which states that the fundamental principles structuring the political realm must be such as can be rationally vindicated to citizens subject to it.”).

66 See *generally* SOREN KIERKEGAARD, *FEAR AND TREMBLING AND SICKNESS UNTO DEATH* (Walter Lowrie trans., 1968) (1843-1849).

generally does not exalt the self and its capacity to aim and direct itself. Rather, it takes the idea of submission to the will of God as the primal and proper moral stance for humanity. Indeed, the very word Islam means submission.⁶⁷ Likewise, for Christians the New Testament teaches that human beings are not simply God's creation but also somehow under further obligation to him because of the sacrifice of Jesus Christ. As Paul wrote in his first epistle to the Corinthians, "What? Know ye not that your body is the temple of the Holy Ghost which is in you, which ye have of God, and ye are not your own? For ye are bought with a price: therefore glorify God in your body, and in your spirit, which are God's."⁶⁸ Similarly, the central ambition of some strands of Judaism is not a wholly self-authored life, but one that is minutely regulated by Torah and the infinitely explicated rules of the Halakha.⁶⁹

The partisans of personal autonomy will hasten to respond at this point that their vision of liberalism is not necessarily hostile to community, family, religious belief, or personal devotion. In a properly functioning liberal regime that respects personal autonomy, they will insist, religious life is to be respected so long as it results from authentic personal choice. This response, however, continues to insist on self-ownership and conceptualizes religious piety as a kind of preference that one might indulge. It makes allegiance to clan, family, or confession hinge on authenticity conditions that often are not met in the real faiths, tribes, and kinships around which many people order their lives. Whatever the merits of a full-throated defense of autonomy, for example, it is unlikely to command the assent of all pious Muslims or devout Christians who see the human self and any freedom that it might have as wholly contingent on God. Furthermore, these are not simply idiosyncratic metaphysical beliefs. They form the foundation for communities and entire ways of life. John Gray puts the point thus:

In recent liberal writings, the fact of pluralism refers to diversity of personal ideals whose place is in the realm of voluntary association. The

67 See Cyril Glasse, *Islam*, in *THE NEW ENCYCLOPEDIA OF ISLAM* 249, 249-250 (3rd ed. 2008). Islam – submission – is one of the three great pillars of Islamic religion, the others being *iman* (faith) and *ihsan* (virtue). See *id.* at 243, 238.

68 1 *Corinthians* 6:19-20 (King James Bible). In Christian theology this idea is central to soteriology, the theory of salvation. See generally GUSTAF AULEN, *CHRISTUS VICTOR: AN HISTORICAL STUDY OF THE THREE MAIN TYPES OF THE IDEA OF ATONEMENT* (A.G. Hebert trans., 1961).

69 See generally RABBI JOSEPH B. SOLOVEITCHIK, *HALAKHIC MAN* (1984) (setting forth the spiritual value of a life devoted to Torah); MENACHEM ELON, *JEWISH LAW: HISTORY, SOURCES, PRINCIPLES* (reprint ed. 2003) (summarizing the history of Jewish law).

background idea here is that of the autonomous individual selecting a particular style of life. This type of diversity resembles the diversity of ethnic cuisines that can be found in some cities. Like the choice of an ethnic restaurant, the adoption of a personal ideal occurs in private life. But the fact of pluralism is not the trivial and banal truth that individuals hold two different personal ideals. It is the coexistence of different ways of life. Conventional liberal thought contrives to misunderstand this fact, because it takes for granted a consensus on liberal values.⁷⁰

If by liberal values, however, we mean something like the ideal self-ownership and the primacy of individual autonomy as the foundation for a politically and morally defensible way of life, no such consensus in fact exists.

III. A MODEST CONTRACT LAW FOR A MODEST LIBERALISM

What are the implications for contract law if we adopt a more modest vision of liberalism? The key difference between a liberalism based on autonomy and what we might group together as liberalisms of fear is that for the former autonomy is a primary normative ideal, one that undergirds the entire apparatus of liberal institutions. In contrast, for the latter, personal autonomy has merely instrumental value. Promoting individual autonomy may be a way of fostering peaceful coexistence among competing and incommensurable ways of life. Likewise, a healthy regard for individual freedom may discipline the coercive apparatus of the state and other dominating interests in society, limiting their ability to inflict fear and cruelty on the vulnerable. However, personal autonomy is no longer taken as a primary political good to be maximized for its own sake. The implication for contract law lies in this more subdued stance towards personal autonomy.

For CTC, the state has a positive mandate to increase autonomy by increasing the range of transactional options available to contracting parties.⁷¹ More modest visions of liberalism, however, offer no reason why the state is obligated to provide an expanded menu of transactional forms. Rather, contrary to the position taken in CTC, more modest versions of liberalism would place the commercial contract at the center of contract law.⁷² Instead of seeing contract law as enhancing personal autonomy, a more modest vision of liberalism

70 GRAY, *supra* note 59, at 32.

71 See CTC, *supra* note 5, at 68.

72 See generally OMAN, *supra* note 7 (arguing that markets provide the primary justification for contract law); Nathan B. Oman, *Markets as a Moral Foundation for Contract Law*, 98 IOWA L. REV. 183 (2012) (same).

would be content for contract law to remain the servant of commerce. Markets have much with which to recommend themselves to such a *modus vivendi* vision of liberalism. Market exchange provides an institutional framework for cooperation among those with incommensurable worldviews. Indeed, often it performs this feat better than more overtly political institutions. Thus, the relative ease and sheer volume of cooperative activity that occurs through market transactions dwarfs the tortured and frequently unsuccessful process of public debate, elections, and legislation.⁷³

Markets also serve to inculcate habits of mutual forbearance that are particularly useful under conditions where we live in close proximity with those beyond our social, religious, ethnic, sexual, moral, and political tribes. This is the so-called *doux commerce* thesis propounded by Montesquieu and other 18th-century theorists of the market.⁷⁴ It is possible, of course, to be Panglossian about *doux commerce*.⁷⁵ One cannot plausibly claim that markets will lead inevitably to widespread mutual tolerance. Indeed, sometimes the opposite is true.⁷⁶ Nevertheless, it is true that markets encourage mutual understanding and

73 Jules Coleman makes the point thus:

The conditions under which [citizens] may prefer market to collective or political decision rules include those cases in which there are fundamental disagreements about what counts as a good life or makes a life worth living, where the members of the community are diverse in their backgrounds and histories and where they are dispersed geographically. In such cases allocation decision to public debate may create too much strain on the network of abstract bonds that connect members of the community with one another. Markets do not pressure those bonds unduly.

JULES COLEMAN, RISKS AND WRONGS 69 (2002).

74 See generally ALBERT O. HIRSCHMAN, THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH (1977) (summarizing the arguments that commerce shackles socially destructive impulses).

75 Indeed, the creator of Pangloss himself might be accused of this sin. Voltaire presented an incredibly rosy vision of market interaction, writing:

Take a view of the Royal Exchange in London, a place more venerable than many courts of justice, where the representatives of all nations meet for the benefit of mankind. There the Jew, the Mahometan, and the Christian transact together, as though they all professed the same religion, and give the name of infidel to none but bankrupts. There the Presbyterian confides in the Anabaptist, and the Churchman depends on the Quaker's word. At the breaking up of this pacific and free assembly, some withdraw to the synagogue, and others to take a glass.

VOLTAIRE, PHILOSOPHICAL LETTERS 26 (2011).

76 See generally AMY CHUA, WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY (2004) (documenting the ways in which liberalizing international markets can lead to ethnic conflict).

recognition. Successful commerce requires that we understand the goals and needs of our counterparties. “It is not from the benevolence of the butcher, the brewer, or the baker, that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages.”⁷⁷ This is a process that requires some mutual understanding. Furthermore, beyond Adam Smith’s intuitive insight there is modern social science research suggesting that those who are engaged primarily in commerce for their subsistence are more prosocial than those who pursue more autarkic economic lives.⁷⁸

In short, rather than define contract law as an autonomy-advancing menu of transactional types, contract law has more muted normative ambitions when grounded in a modest vision of liberalism. It is enough that contract law supports commerce, with the market being one among several institutional frameworks that make a *modus vivendi* between competing and at times incommensurable ways of life possible. John Gray put the point thus:

The institutions of the market advance human well-being to the extent that they enable individuals and communities with different or incompatible goals and interests to trade with one another to mutual advantage. This classical defense of market institutions can be given another formulation. Individuals and communities animated by rival and (in part) incommensurable values can interact in markets without needing to reconcile these rival conceptions of the good. Market institutions assist personal autonomy and social pluralism by enabling such communities to replace destructive conflict by beneficial competition.⁷⁹

A necessary condition, however, for any extensive system of healthy markets is the enforcement of contracts. Furthermore, given the high level of complexity that we see in modern markets, it is implausible to imagine that legislators and other lawmaking officials have the information and expertise to author the obligations best suited for each kind of commercial transaction.⁸⁰ CTC

77 ADAM SMITH, *THE WEALTH OF NATIONS* 26–27 (R. H. Campbell, Andrew S. Skinner & W.B. Todd eds., 2009) (1776).

78 See OMAN, *supra* note 7, at 44–47 (summarizing cross-cultural research on the effects of commerce and cooperative economic activity on trust and pro-social behavior).

79 GRAY, *supra* note 59, at 36–37.

80 See generally Alan Schwartz & Robert E. Scott, *The Common Law of Contract and the Default Rule Project*, 102 VA. L. REV. 1523 (2016) (arguing that there are relatively few broadly useful default rules that can be supplied by lawmakers because of the diversity of transactional situations); Friedrich A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945) (arguing that centralizing

suggests that the state can create a large number of transactional structures with relatively detailed default rules for each structure. However, as Daniel Markovits and Ala Schwartz persuasively argue, it is unlikely, given the diversity and complexity of private intentions, that there is much room for expansion of default terms in the way envisioned by CTC.⁸¹ We also have reasons of political economy grounded in the fear of rent-seeking for favoring generalized bodies of law.⁸² Accordingly, we would desire — and in fact observe — that contract law provides a high level of party autonomy within a framework of relatively abstract rules that have little if any substantive content. In this limited sense Williston got it right, and the commercial contract quite properly is the core case of contract law.

One might object that this less ambitious vision of contract law is both too pessimistic and too optimistic. It is too pessimistic because it imagines a deep incommensurability of moral visions, one that cannot be bridged by a shared vision of the autonomously choosing self. This seems an unduly dark vision, so goes the argument, of alienated tribes simmering on the edge of the war of all against all. At the same time, a critic might argue, the *doux* commerce vision of the market is impossibly optimistic, a fantasy vision of contented and peaceful merchants pursuing happiness and prosperity for all.

Ultimately, however, it is the autonomy vision that is both too optimistic and too pessimistic. For the autonomous chooser to act as the solvent of moral pluralism, people must be persuaded of the moral sovereignty of the autonomous chooser and as a theoretical matter such a chooser must be possible. Both of these are dubious propositions. The moral world is probably not best thought of as a glorious ethnic food fair with an ever-expanding menu of exotic options to be tasted and sampled by the moral chooser. This may sound pessimistic, but it seems nothing more than a realistic acceptance of the deep moral pluralism that in fact exists in the world, a pluralism that is unlikely to recede in the face of autonomy theories, no matter how eloquent and elegant in construction. This doesn't mean, however, that we are condemned to live in illiberal societies. A modest liberalism is, seen from another perspective, quite optimistic. It suggests that despite deep moral pluralism — a pluralism

decision making about economic matters is doomed to failure because of the difficulty of amassing the necessary information).

81 See Daniel Markovits & Alan Schwartz, *Plural Values in Contract Law: Theory and Implementation*, 20 THEORETICAL INQUIRIES L. 571 (2019) (criticizing CTC's default rules project as impractical).

82 See generally Nathan B. Oman, *A Pragmatic Defense of Contract Law*, 98 GEO. L.J. 77 (2009) (arguing that specialized bodies of contract law create incentives for rent-seeking behavior).

that forecloses even agreement on a morally sovereign self that chooses amongst moral positions — it is nevertheless possible to generate consensus around liberal practices and institutions. Such agreement does not require a foundation of autonomously choosing agents. It is enough that one prefers peace to war with one's neighbors and recognizes that enemies and heretics may ascend to the control of powerful institutions in society. Accordingly, the scope of those institutions' authority ought to be limited.

This suggests that the justifiability of liberal institutions is historically contingent. It holds true for the current conditions in pluralistic societies, but it may be possible to imagine historical conditions in which a *modus vivendi* case for liberalism may be difficult. However, faced with the choice between a theory that works given current conditions but might fail in imagined conditions, and a theory that can succeed under imaginary conditions but is deeply problematic given the world in which we live, prudence seems to counsel in favor of the former over the latter.

When it comes to the scope of contract law, we can see the difference between CTC and an approach based on a more modest vision of liberalism by considering how each theory would approach the issue of same-sex marriage. Obviously, traditionalists and proponents of same-sex marriage have very different views regarding the propriety of extending marriage to include gay and lesbian couples. However, despite these differences, they share a view of marriage that does not place autonomy at the center of debates about same-sex marriage. Rather, the question whether the law should provide alternatives to heterosexual marriage hinged on whether or not same-sex unions could provide the goods associated with marriage and whether or not there was a social need for a legal institution of marriage for same-sex couples.⁸³ The central issues revolved around the nature of sexual identity, the goods of marriage, and the desire of same-sex couples for social recognition. None of these concerns were ultimately about extending the autonomy of LGBT or straight couples by expanding the range of options among which they could choose. Indeed, the heart of the LGBT critique of the traditionalist position is that because of immutable sexual orientations heterosexual marriage was not a viable option for same-sex couples, who nevertheless sought the goods associated with marriage.

Elizabeth and Robert Scott, although paying lip service to the language of freedom and autonomy, provide a model of alternative marriage structures

83 Compare RAUCH, *supra* note 35 (making a “conservative” case for same-sex marriage); SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, *WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE* (2012) (arguing that same-sex unions don't advance the goods of marriage).

that highlights the limited role of autonomy in debates over their legal recognition.⁸⁴ They begin with the brute empirical fact that while same-sex marriage has managed to win widespread legal recognition (they were writing before the Supreme Court's decision in *Obergefell*⁸⁵), other alternative family structures, such as polygamy and polyamory, have not succeeded in gaining legal recognition.⁸⁶ They posit that one of the central roles of marriage in our society is to handle what they call "dependency needs" and that society is unwilling to extend legal recognition to alternative family structures until those structures demonstrate that they are capable of successfully meeting these "dependency needs."⁸⁷ The failure of polygamy and polyamory to gain legal recognition results from the difficulty of determining whether or not these alternative structures can meet those needs. The difficulty arises both because the participants in such arrangements may be unsure as to their ultimate success and stability and because society at large lacks good information about the effectiveness of such arrangements in meeting "dependency needs."⁸⁸ The success of the same-sex marriage movement arose out of the fact that prior to the legal recognition of same-sex marriage there were already many long-term, monogamous same-sex couples. The experience of these couples provided evidence both to the couples themselves and to the broader society that same-sex marriage could effectively meet such "dependency needs."⁸⁹

If marriage is primarily a way in which the state recognizes and accommodates actually existing ways of life, rather than enhancing autonomy by expanding the range of marital options available to citizens, then the relationship between marriage and contract law shifts. A more modest vision of liberalism would be content to conceptualize contract law as primarily a mechanism for enhancing well-functioning markets. Accordingly, the question whether or not a particular area of life or area of the law should be contractualized hinges on whether

84 See generally Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293 (2015) (offering a theory of the success of novel marriage structures).

85 *Obergefell v. Hodges*, 576 U.S. (2015).

86 Scott & Scott, *supra* note 84, at 314 ("In a society in which the public accepts family diversity and acknowledges the importance of families to individual and collective welfare, what explains the legal inertia?").

87 *Id.* at 316-18 (discussing the problem of relational novelty).

88 *Id.* at 364-69 (discussing the difficulty of obtaining legal recognition for polygamous families).

89 *Id.* at 344-58 (discussing the success of same-sex marriage proponents and the sources of that success).

or not we wish to extend market structures into that area.⁹⁰ In the context of marriage, this suggests that the move to contractualize marriage through the enforcement of such devices as prenuptial agreements is in part a matter of injecting the process of adversarial bargaining into intimate family relationships.⁹¹ Not surprisingly, the law has been suspicious of such efforts.⁹²

The modest vision of liberalism and the associated market-centered vision of contract law would suggest that the law's suspicion in this context is well justified. This is not because, as CTC argues, it is important to provide citizens with a range of options from which to choose in forming their families. Rather, the fear is that by injecting commercial values into areas of life generally not governed by commercial concerns, the state may be undermining those ways of life. It is precisely, however, the need to accommodate differing ways of life within a *modus vivendi* that counsels against the state intervening in or undermining a particular way of life unless it has some reason to do so based on concerns related to cruelty or domination.⁹³

Hence, a market-based theory of contract would have relatively little to say about same-sex marriage, although it would rest on a vision of liberal political philosophy that is friendly to the claims of same-sex couples insofar as those claims represent an actual way of life being pursued by citizens. However, the market theory would suggest a certain level of suspicion around the contractualization of marriage, whether of the same-sex or opposite-sex variety. Crucially, this approach to contract law does not insist that every legal obligation triggered by voluntary or intentional action should be conceptualized as a contract and that the law governing such transactions is a "law of contracts" that an adequate theory of contract law must address. No one argues that an adequate theory of contract must account for doctrines such

90 See OMAN, *supra* note 7, at 173-75 (discussing how extending contract law can extend a commercial ethos into a non-commercial setting).

91 *Id.* at 174-79 (discussing the contractualization of marriage).

92 See, e.g., UNIF. PREMARITAL AGREEMENT ACT §9(a) (1983) (setting forth formation requirements – such as full disclosure and representation by counsel – not ordinarily required to form a contract). See generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998) (arguing that the premarital contracting creates unique challenges because of the bargaining context).

93 See JACOB T. LEVY, RATIONALISM, PLURALISM, AND FREEDOM 283 (2015) (“[A] liberal understanding of freedom is constitutively torn between a rationalist distrust of the local, the particular, and power embedded within group life, and a pluralist emphasis on the freedom found within and protected by group life against the power of the state.”).

as waiver, laches, or equitable estoppel, which involve the shifting of legal rights as a result of voluntary choices, even when such choices are intended to shift such rights. The same is true of marriage. Marriage law in general is not a branch of contract law that a theory of contract must explain. It is enough that contract law can be justified within a political theory — in this case a modest, *modus vivendi* liberalism — that can also justify and critique the law of marriage.

CONCLUSION

CTC is an important, elegant, and novel contribution to contract theory. It represents a step forward over earlier, rights-based theories that have traditionally formed the heart of liberal theories of contract law. Likewise, CTC is to be praised for its willingness to take seriously the insights of law and economics for large swaths of contract doctrine, while insisting that efficiency analysis requires a more sophisticated normative basis than the implicit utilitarianism on which it is generally rested.

Notwithstanding these virtues, CTC presents a vision of contract law which is not without difficulties. It requires an allegiance to a particularly grandiose vision of liberalism that places at its center a strong vision of autonomously choosing individuals and the necessity of autonomy for human flourishing. As an empirical matter, it is unlikely that this vision of human flourishing can command substantial support outside of well-educated circles in advanced liberal democracies. Many reasonable people are likely to reject the core assumptions of self-ownership and personal autonomy on which the theory rests. While these individuals and groups may ultimately be mistaken about the nature of human beings and the good life, political and legal institutions nevertheless must be justified by an argument that such individuals and groups would find plausible. It is not enough, as liberal theorists are at times prone to do, to artificially constrict the definition of a reasonable citizen so as to gerrymander philosophical consensus around highly contestable visions of human choice and human flourishing.

Fortunately, maintaining the *de facto* legitimacy and normative *bona fides* of liberal institutions and practices does not require widespread acceptance of a vision of humanity as autonomous choosers of their own, self-authored visions of the good. Those for whom the vision of self-ownership seems foreign, or who reject the normative primacy of self-authorship in favor of ways of life based around communal, familial, or religious piety, can nevertheless accept and celebrate liberal practices and institutions as a way of peacefully and productively coexisting in a world with multiple incommensurable ways

of life. Subscribing to this more modest vision of liberalism, however, has implications for our theory of contract law. A contract law grounded in such a theory of liberalism will likewise be more modest. Rather than pursue a grandiose project of enhancing fundamental human autonomy, it is enough for contract law to act as a midwife to commerce.