

ETHICS AND ECONOMICS

The Dignity of Commerce: Markets and the Moral Foundations of Contract Law

Nathan B. Oman

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Well-functioning markets produce at least three desirable outcomes. They foster peaceful cooperation, often among strangers who do not share the same religious, political, or economic views. Furthermore, markets instill virtuous habits and moral behavior. And, last but not least, they contribute to material prosperity and the generation of wealth, which has a salutary effect on a host of moral evils. In light of these positive effects of well-functioning markets, the main argument of the book under review is that the normative foundation of the enforceability of contracts is the support of those markets. The author, an eminent contract lawyer at William & Mary Law School, sees the basic principle of contract law as the result of a double remove: since the moral goods mentioned above are the consequence of well-functioning markets, and those markets rely on stable agreements, the law of contract needs to be designed in such a way as to ensure the stability of such contracts. In the eyes of a legal historian, the consequentialist nature of Oman's argument about markets and the moral foundations of contract law resembles the justification of freedom of marriage in the medieval canon law tradition. The aim of marriage was considered to be the generation of offspring and the Christian upbringing of the children—moral goods which required a stable and permanent partnership between husband and wife. Such stability being dependent on free choice, protecting freedom of marriage was considered to be the cornerstone of the law of marriage.

The consequentialist argument for the law's enforcement of contracts as developed in *The Dignity of Commerce* contrasts with two more popular accounts of the justification of contract law. One is the promise theory of contract. It is inevitably associated with the name of Charles Fried, who argued that law's protection of contracts is the translation, in the field of law, of the moral bindingness of promises. Legal moralists such as Fried also argue that the promise principle is consonant with a liberal political morality that respects the autonomous choices of citizens. The fact that the legal enforcement of moral promises may facilitate markets is not considered by the legal moralists as a central element in the explanation or justification of the law of contract. The other popular theory of contract that leaves Oman unsatisfied has been advocated by the law and economics movement. They do take markets seriously, but ignore the moral status of markets, concentrating almost exclusively on the efficient allocation of scarce resources and the satisfaction of individual preferences, which, as Oman observes, should not be considered in and of itself a morally worthy goal. The morally desirable outcomes of markets cannot be reduced to efficient allocation of resources, as the example of peaceful cooperation in a pluralistic society illustrates. While *The Dignity of Commerce* does not entirely reject the promise theory or efficiency theory of the law of contract, it points out the relative absence of the idea of the moral status of markets in those traditional accounts.

The book under review opens with a reflection on Shakespeare's *Merchant of Venice* that illustrates the interconnectedness between markets and contract law. Antonio (the rich merchant who acted as a surety for his friend Bassanio's loan agreement with Shylock the Jew) was compelled to keep his contract not primarily for moral reasons, but in the interest of the city. His contractual obligation must be enforced not because of fidelity to promises, but because of the stability and attractiveness of Venice's marketplace. Enforcing contracts, then, fosters the market. Even strangers know that they can rely on the justice of commercial exchange. Therefore, Oman sees an interesting chronological coincidence between the first performance of Shakespeare's play in 1596 or 1597, and the decision in Slade's case (1602). Slade's case was a milestone in the formation of the modern common law of contract, since it allowed plaintiffs to sue parties who had reneged on their contracts on the basis of "assumpsit" and not only on the basis of the writ of debt. The writ of debt implied a wager of law, involving oath-taking, but at a time of commercial expansion that witnessed the depersonalization of markets, personal honor and religious fear became less reliable than the commitment by the political authorities to legally enforce contracts to guarantee well-functioning markets.

In the first part of the book, Oman offers a definition of what he considers as well-functioning markets and further details the positive moral consequences that one may expect from them. He singles out the characteristics of well-functioning markets: They are places for the exchange of property and services that allow for the collective social practice of allocating resources and which are relatively open to all participants, regardless of their basic identity and convictions. Oman rejects the notion that perfect competition is the economic model that should be the starting point for contract law, considering it too abstract in nature. He is also skeptical about the notion that voluntariness *per se* is a

fundamental characteristic of well-functioning markets, preferring to look at the social structure of the market instead. Finally, Oman rejects the pessimistic views of the relationship between virtue, liberalism, and markets because, for instance, trade promotes the capacity to consider other people's interests.

While the first part of the book sets out the normative framework of Oman's market based theory of contractual obligation, the second part deals with the problems of pathological markets and with specific issues in American contract law, such as the doctrine of consideration, the structure of remedies, and boilerplate agreements. The latter agreements are also known as contracts of adhesion, such as license agreements one has to sign before downloading software or using technical devices. They typically contain lengthy, unreadable statements that are practically never read by consumers. Since they are offered on a take-it-or-leave-it basis, and traditional theories of contract have a tendency to put a high value on voluntary consent, the autonomy theory of contract and the economic efficiency theory of contract have a hard time approving of those contracts, despite their widespread use in modern societies. Oman's market argument, however, reorients the debate away from questions of individual consent toward the way in which contracts facilitate commerce. He has fewer problems, then, in acknowledging the value of enforcing such contracts as long as other conditions are met that guarantee sufficient protection against abuse of weaker contracting parties.

By way of conclusion, this is an absolutely brilliant and original monograph, offering a host of fresh insights on the theory, actual functioning, and history of contract law. The author displays a rare capacity to communicate his sharp insights into the technical aspects of the law in an easily accessible and entertaining style. The variegated examples taken from literature and world history to buttress technical arguments are not only convincing but a pleasure to read. Few books on the theory of contract law refer to Plutarch's story of Spartacus's failed dealings with the Cilician pirates as a way to explain the dangers of ex post opportunism in the absence of sufficient security of exchange. Because of his unique sensitivity to the contextual nature of rules of contract, including their interaction with moral, societal, and economic values, the author has offered a truly interesting and thought-provoking alternative to traditional theories for justifying the enforceability of contracts.

—Wim Decock
Universities of Leuven and Liège, Belgium