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How Well Do We Treat Each Other in Contract?

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HOW WELL DO WE TREAT EACH OTHER IN CONTRACT?

ADITI BAGCHI*

ABSTRACT

One of the important contributions of Nathan Oman's new book is to draw focus onto the quality of the relationships enabled by contract. He claims that contract, by supporting markets, cultivates certain virtues; helps facilitate cooperation among people with diverse commitments; and produces the wealth that may fuel interpersonal and social justice. These claims are all plausible, though subject to individual challenge. However, there is an alternative story to tell about the kinds of relationships that arise from markets—i.e., a story about domination. The experience of domination is driven in part by the necessity, inequality, and competition enjoined by markets, and partly by the very structure of authority created by legally binding promise. Oman is right to look to markets for the normative character of contract but the ethics of contract are more ambiguous than he allows.

* Professor of Law at Fordham University School of Law. Thanks to Nathan Oman for the opportunity to respond to his book in this forum. Although I was unable to attend the conference for banal reasons of weather, I am thrilled to participate in this substantive celebration of his achievement.

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INTRODUCTION

Contracts are between two people.¹ Philosophers of private law, including contract, make much of this fact.² By contrast, legal economists have long focused on the ways in which any given contractual relationship is the product of markets and how it, in turn, marginally shapes those markets going forward.³ Legal economists have understood contract law to be the rules of the market.⁴

Legal economists have been criticized for their apparent failure to take bilateralism seriously.⁵ In its bare form, this criticism is not quite fair; economists have developed sophisticated accounts of bilateral negotiations, both by way of formal models and game theory⁶ and cognitive psychology.⁷ But they do not take the bilateralism of legal adjudication of disputes arising out of contract

¹ *Contract*, BARRON'S LAW DICTIONARY (Steven H. 4th ed. 1996).

² See STEPHEN A. SMITH, CONTRACT THEORY 14–24 (2004) (examining the structure of contracts between two people, which often features one party with bargaining power and one without); see also JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY 18 (2001); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 460–63 (2000).

³ See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 115–80 (8th ed. 2011).

⁴ SMITH, *supra* note 2, at 43.

⁵ See Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1248 (1988) (observing that in the tort context, economic analysis views the relationship between victim and tortfeasor as “tenuous and radically contingent”); see also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 702–09 (2003); Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 358 (2001) (describing the ad hoc character of legal economics explanations of property rules). *But see* Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 298–99 (2007) (arguing that economic analysis is consistent with the internal point of view).

⁶ See, e.g., Marco Battaglini, *Optimality and Renegotiation in Dynamic Contracting*, 60 GAMES & ECON. BEHAV. 213, 214 (2007); Paul Beaudry & Michel Poitevin, *Signalling and Renegotiation in Contractual Relationships*, 61 ECONOMETRICA 745 (1993); Oliver D. Hart & Jean Tirole, *Contract Renegotiation and Coasian Dynamics*, 55 REV. ECON. STUD. 509, 511 (1988); Joel Sobel & Ichiro Takahashi, *A Multistage Model of Bargaining*, 50 REV. ECON. STUD. 411 (1983).

⁷ See Melvin A. Eisenberg, *Behavioral Economics and Contract Law*, in THE OXFORD HANDBOOK OF BEHAVIORAL ECONOMICS AND THE LAW 438, 442 (Eyal Zamir & Doron Teichman eds., 2014).

to be an important feature of contract law,⁸ and they are relatively uninterested in the moral dimension of any bilateral relationship that results from contract.⁹ These are drawbacks to the legal economic literature.

Philosophers of contract, by contrast, have had much to say about the bilateralism of contracts as well as private law adjudication.¹⁰ It is the starting point for more than one theory of contract.¹¹ However, our error tends to be the flip side of the one perpetuated by legal economists.¹² Philosophers of contract have spent too much time thinking about the bilateral relationship in isolation, neglecting that any given agreement is the byproduct of a market and is situated within broader market institutions.¹³ In his refreshing and astute new book,¹⁴ Nate Oman contends that the moral upshot of contract depends on the moral significance of markets.¹⁵ He is right. Some of us who have been concerned to connect the moral dots between individual contracts have focused on the demands of distributive justice.¹⁶ Few scholars, like Oman, have focused on the ethics of contract or its effect on character.¹⁷ Oman concentrates not on the moral demands that justice in the marketplace

⁸ NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* (2016) (addressing the lack of legal economists' commentary on bilateralism's effect on contract law).

⁹ POSNER, *supra* note 3, at 117 (foregoing the moral repercussions that may occur within a bilateral contract as not relevant to the purpose of contract law).

¹⁰ SMITH, *supra* note 2, at 56, 63–64.

¹¹ *Id.* at 55 (outlining various contract theories that rely on agreements between two parties).

¹² See OMAN, *supra* note 8, at 114–15 (arguing economists tend to be too silent about bilateralism's role in contract); SMITH, *supra* note 2, at 63–64 (addressing that bilateralism of contracts is a consequence of consideration).

¹³ See SMITH, *supra* note 2, at 63–64 (arguing bilateralism goes to understanding an agreement, but not addressing how contracts fit into the market system); see also OMAN, *supra* note 8, at 183.

¹⁴ See generally OMAN, *supra* note 8.

¹⁵ *Id.* at 1.

¹⁶ See Aditi Bagchi, *Distributive Justice and Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 193 (Gregory Klass et al. eds., 2014) [hereinafter Bagchi, *Justice and Contract*]; Aditi Bagchi, *Distributive Injustice and Private Law*, 60 *HASTINGS L.J.* 105 (2008).

¹⁷ See Eisenberg, *supra* note 7, at 442 (examining how psychology affects decision making when entering contractual relationships, but not how contract affects character); see also POSNER, *supra* note 3, at 117 (arguing that the basic

places on individual contracts but on the ethical dynamics in contract that are fostered by markets.¹⁸ Along the lines of Adam Smith, he takes the effects of contract on character and civil society to be essentially civilizing.¹⁹ And so he provides us with reasons to celebrate markets beyond the material wealth that they generate.²⁰

In what follows, I will first summarize Oman's claims, especially three propositions of primary concern here. First, Oman argues that the process of agreement-making and -keeping cultivates certain virtues in itself.²¹ Second, contract within markets is said to facilitate cooperation among diverse persons, and this enterprising contact with others is good.²² Finally, as the foundation of markets, contracts generate wealth,²³ and Oman contends that wealth makes it easier to cultivate certain virtues.²⁴ There is some truth in each of these claims, and they are important, correcting contributions to a literature that occasionally alludes to the ethics of contract as a framing matter, but rarely manages a sustained focus like the one Oman provides. Nevertheless, Part I also identifies grounds for caution with respect to each of the optimistic conclusions about the effects of the market on participants' character, especially as it is relevant to sustaining a liberal democratic order.²⁵ We face great empirical uncertainty about exactly what kind of interactions contract inspires and whether these are as salutary as Oman suggests.²⁶ My various doubts about Oman's specific claims will lead us into Part II of this Essay, which raises a more general challenge.²⁷

aim of contract law is to deter people from acting opportunistically, but not discussing the ethics of contracts).

¹⁸ OMAN, *supra* note 8, at 15.

¹⁹ See ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 18–21 (1776).

²⁰ See OMAN, *supra* note 8, at 13.

²¹ *Id.* at 79.

²² *Id.* at 43–44.

²³ *Id.* at 16.

²⁴ *Id.* at 63–66.

²⁵ See *infra* Part I.

²⁶ See OMAN, *supra* note 8, at 101, 172, 184 (discussing various interactions that contracts inspire). For a complete discussion of the uncertainties of the relationships Oman discusses, see *infra* Part I.

²⁷ See *infra* Part II.

Part II will offer an alternative, rival picture of contract.²⁸ The more pessimistic narrative operates at two levels. First, because markets operate on a background of inequality, market relationships are often sharply hierarchical, with one party at the mercy of the other.²⁹ Even more important, people systematically experience the market differently over time, such that their innate sense of obligation or entitlement, control or chaos, varies depending on their material resources.³⁰ The result is a political community within which there is a vast disparity in our experience of fellow citizens.³¹ The possibility that domination will centrally define civil relationships is perhaps even more evident when we consider the structure of individual contracts, which (for good reason) gives legal backing to the power some individuals exercise over others.³² The experience of market domination does not optimally prepare either the dominant or the dominated for egalitarian politics.³³

I. OMAN'S ACCOUNT OF THE VIRTUES FOSTERED BY CONTRACT

Oman does not purport to talk about the virtues emanating from contractual relationships as such.³⁴ Because he is interested in contracts as the building blocks of markets,³⁵ he talks about the virtues fostered by markets, or more specifically, by participation in markets.³⁶ This is an interesting choice because many of Oman's points could have been cast as claims about the ways in which contracting parties are altered directly—for the good—by the practice of entering into arms-length commitments with non-intimates.³⁷

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *See id.*

³³ *Id.*

³⁴ *See OMAN, supra* note 8, at 84 (arguing that contractual relationships foster virtues in society, but drawing a distinction between virtue in contract and virtue in markets).

³⁵ *Id.* at 18.

³⁶ *See id.* at 16, 56.

³⁷ *See id.* at 10–11.

It is in fact quite difficult to tease apart the effects of agreement, contract, and market participation.³⁸ These distinctions matter not just to the question of where we assign credit, but what policy lessons we might draw.³⁹ It might turn out that much of what we have to celebrate and worry about with respect to contract is rooted in the institution of the market, and no tinkering with contract law on the margin will make a difference. In that case, our discussion of the ethics of contract is really about the choice to use it as an instrument of social organization, not the many smaller choices about how to shape the law of contract.⁴⁰

Oman's focus is not on these policy implications that sit on the margin.⁴¹ His priority is to defend contract and market as a bundle on the grounds of their contributions to the liberal democratic order to which his audience is categorically committed.⁴² Regardless of whether contracts or markets are identified as the first fountain of virtue, Oman's starting point is that liberalism is not self-sustaining.⁴³ He does not anchor his argument in the independent good of virtue.⁴⁴ That is, he does not argue that contract law is valuable because it supports markets, which in turn foster virtue—period.⁴⁵ Virtue standing alone would be too controversial and illiberal an ultimate aim for private law.⁴⁶ Instead, Oman argues that liberal democracy depends on markets to create citizens, or at least, that the virtues fostered by participation in the market translate into better citizenship.⁴⁷ This three-part link between citizenship, virtue, and markets generates an instrumental reason why the state should be interested in supporting markets that does not depend on the state engineering virtue for its own sake.⁴⁸

³⁸ *See id.* at 15–16.

³⁹ *See id.* at 16–17.

⁴⁰ *See id.* at 58, 68, 162.

⁴¹ *See id.* at 162.

⁴² *See id.* at 21.

⁴³ *See id.* at 43.

⁴⁴ *See id.* at 49.

⁴⁵ *See id.*

⁴⁶ *See id.* at 41–42.

⁴⁷ *See id.* at 49.

⁴⁸ *See id.*

Even this instrumental take on virtue is controversial,⁴⁹ though, and understanding Oman's argument requires understanding the entrenched views he implicitly rejects. No less than Immanuel Kant argued that it is possible to be a good citizen without being a good person, and indeed, it is the task of a state to create just relations among citizens even if they are a "nation of devils."⁵⁰ It is perhaps such thinking that has generally put liberals at odds with the conservative emphasis on personal virtue.⁵¹ But even Aristotle, perhaps the most esteemed philosopher of virtue and one who believed that the state's ultimate (and illiberal) aim should be to create good persons (and not just good citizens),⁵² took the virtues relevant to citizenship to be of a different sort than those that make a good person.⁵³

Thus, some readers might depart from Oman at his very premises.⁵⁴ One might disagree that personal virtue is relevant to law. In particular, one might disagree that any personal virtues fostered by markets are relevant to the liberal democratic project.⁵⁵ Liberal democracy does not necessarily require the people empathize or consort with people different than themselves.⁵⁶ It requires only that they "get along" in the minimal sense of maintaining peaceful relations under a state that directs them to right action.⁵⁷

Oman does spend some time talking about the imperative of avoiding religious conflict,⁵⁸ but his argument that liberal democracy requires private virtue seems to assume a higher standard for liberal democracy than avoiding civil war.⁵⁹ He is right to aim

⁴⁹ See *infra* text accompanying notes 51–54.

⁵⁰ Immanuel Kant, *Toward Perpetual Peace: A Philosophical Sketch*, in TOWARD PERPETUAL PEACE AND OTHER WRITINGS ON POLITICS, PEACE, AND HISTORY 90 (Pauline Kleingeld ed., David L. Colclasure trans., Yale University Press 2006).

⁵¹ See OMAN, *supra* note 8, at 41, 77.

⁵² See ARISTOTLE, POLITICS 7 (R.F. Stalley ed., Ernest Barker trans., Oxford University Press 1998).

⁵³ See *id.* at 91–92.

⁵⁴ See *infra* text accompanying notes 56–58.

⁵⁵ See OMAN, *supra* note 8, at 43.

⁵⁶ See *id.* at 51.

⁵⁷ See *id.* at 47.

⁵⁸ See *id.* at 50–51.

⁵⁹ See *id.* at 49.

higher. John Rawls posited a “sense of justice” as an essential moral feature of persons.⁶⁰ Without it, we do not have the will to support just social institutions;⁶¹ in a democracy, the state cannot create just relations among citizens without citizens creating a mandate for it to do so.⁶² Bare self-interest might be enough to motivate the laying down of arms but it will not motivate the redistributive welfare state.⁶³ Are the kinds of civic virtues that Oman is concerned to develop via the market the ones that would redeem the market by way of redistributive market-correcting policies? It is not clear that it would. The moral rhetoric of contract, with its emphasis on consent, assumed risks, and the boundaries between persons,⁶⁴ might not lend itself to the solidaristic impulses, or the ethos of a common fate or shared responsibility, that tend to underwrite the politics of welfare states.⁶⁵

Oman is not very specific about the kinds of virtues that liberal democracy requires as a general matter,⁶⁶ but the ones that he identifies as byproducts of markets are plausibly related to good citizenship in a liberal democratic regime.⁶⁷ Philosophers like Peter Berkowitz have argued that liberals have underestimated the centrality of virtue to implementing liberalism.⁶⁸ It might be that habits of cooperation and open-mindedness need to be instilled by the state to get even the most minimal liberal order off the ground.

The state’s role in fostering virtue is uncomfortable territory for liberals and raises the hard questions about what virtues should make the official list.⁶⁹ However, Oman may avoid much of the angst about the state exercising judgment on matters of the good because he does not call on the state to foster virtue directly,

⁶⁰ JOHN RAWLS, *A THEORY OF JUSTICE* 495 (1971).

⁶¹ *See id.* at 488.

⁶² *See id.* at 492–93.

⁶³ *See OMAN, supra* note 8, at 80–81.

⁶⁴ *See id.* at 10–11.

⁶⁵ *See* Jacob S. Hacker, *Bringing the Welfare State Back In: The Promise (and Perils) of the New Social Welfare History*, 17 *J. POL’Y HIST.* 125, 151 (2005).

⁶⁶ *See OMAN, supra* note 8, at 43.

⁶⁷ *See id.* at 43–44, 46–49.

⁶⁸ PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* x–xiv (1999).

⁶⁹ *See OMAN, supra* note 8, at 41.

or with any precision of target.⁷⁰ The state's role in his narrative is limited to supporting markets.⁷¹ If markets, which are independently worthy of support given their role in producing material wealth,⁷² do the work of cultivating an amorphous set of necessary virtues then the state itself does not have to pick and choose among virtues.

Although Oman does not describe in detail the kind of character that liberal democracy requires, he does elaborate several virtues that markets foster, which are among the presumably larger set that a just political order demands.⁷³ First, Oman argues that the process of agreement-making and -keeping cultivates certain virtues.⁷⁴ Second, contracting within markets is said to facilitate cooperation among diverse persons, and this enterprising contact with others nurtures good qualities.⁷⁵ Finally, as the foundation of markets, contracts generate wealth, and Oman contends that wealth makes it easier to cultivate certain virtues.⁷⁶

The first set of virtues are ones most clearly rooted in the process of contract itself.⁷⁷ People want things that others have or want others to do things for them.⁷⁸ But in order to get what one wants through contract, one must induce her consent to transfer.⁷⁹ In teaching people to do this, Oman says that the market "disciplines and channels acquisitiveness."⁸⁰ Specifically, "[m]arkets require that one consider the point of view of others and alter one's behavior to satisfy their desires."⁸¹ These skills support the liberal virtues of deliberation, or at least the consideration of opposing viewpoints (which seems to be only one aspect of deliberation), and weakens tribal loyalties and aristocratic attitudes.⁸² He argues

⁷⁰ *See id.* at 184.

⁷¹ *Id.* at 84.

⁷² *Id.* at 101.

⁷³ *Id.* at 43.

⁷⁴ *Id.* at 43–44.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 41.

⁷⁸ *Id.* at 42.

⁷⁹ *Id.* at 43–44.

⁸⁰ *Id.* at 43.

⁸¹ *Id.*

⁸² *Id.* at 43–44.

that the “habits inculcated by well-functioning markets will make people adept in precisely the feats of imaginative understanding that liberalism requires.”⁸³ In fact, Oman claims that exchange encourages “other-regardingness.”⁸⁴

Oman is well aware that this is a surprising claim to make.⁸⁵ After all, markets are usually associated with the pursuit of self-interest.⁸⁶ But Oman smartly distinguishes altruism from his idea of “other-regardingness,”⁸⁷ which ends up sounding a lot like cognitive empathy.⁸⁸ That is, markets do not necessarily make us want to promote the interests of others for their own sake.⁸⁹ But they enable us to understand how others think and to understand what they want.⁹⁰ Oman is completely right that this is an essential independent mental quality that may or may not accompany generosity.⁹¹ (In fact, one can imagine misguided altruists who lack this cognitive capacity and are ineffectual as a result.)

Oman points to the comparative results of the Ultimatum Game to evidence his psychological claims.⁹² He cites experiments that suggest that those in more market-based societies were more willing to share a windfall.⁹³ Interestingly, this actually seems to go beyond “other-regardingness” in the sense that Oman describes.⁹⁴ Such behavior would meet the more demanding standards of a sense of justice, or maybe altruism after all.⁹⁵ Of course, it is not possible to know that market participation is what engendered the positive behavior that Oman describes.⁹⁶ As he himself observes, market societies are also likely to be less conflict-ridden (and therefore more socially cooperative) societies, politically functional, and less

⁸³ *Id.* at 46.

⁸⁴ *Id.* at 44.

⁸⁵ *Id.*

⁸⁶ *Id.* at 45.

⁸⁷ *Id.* at 44.

⁸⁸ *Id.* at 83.

⁸⁹ *Id.* at 67.

⁹⁰ *Id.*

⁹¹ *Id.* at 24.

⁹² *Id.* at 45.

⁹³ *Id.*

⁹⁴ *Id.* at 44.

⁹⁵ *But see id.* at 44.

⁹⁶ *But see id.* at 45.

economically desperate.⁹⁷ Any of these features, none of which is necessarily traceable to the market,⁹⁸ could explain the willingness of experiment participants to share their windfalls.⁹⁹ It is not clear that market participation would habituate people to expect even division of a surplus, since the division of the transactional surplus in a bargain depends on underlying bargaining power.¹⁰⁰ Most contracts are made under conditions of unequal bargaining power,¹⁰¹ so people should be accustomed to lopsided divisions. Oman ultimately relies on our sharing his intuition that markets habituate people in the kinds of behaviors that would lead them to *naturally* hand over money to the other participant, against their own self-interest.¹⁰²

Oman's contention that markets breed a kind of "other-regardingness" is related to another claim that is ultimately more compelling; that is, that market societies teach people to deal with people impersonally.¹⁰³ Impersonal contacts in the market are important because "[a]lthough liberal orders need not be radically egalitarian, they do require at a bare minimum that formal distinctions based on class or caste be broken down sufficiently that their social power does not overwhelm liberal institutions."¹⁰⁴

In Oman's account, dealing productively with strangers tends to have two kinds of effects.¹⁰⁵ First, it erodes destructive conceptions of virtue: "[M]arkets ... tend to replace the 'manly' virtues of aristocracy with the more peaceable habits of tradespeople."¹⁰⁶ This loaded claim depends, of course, on the idea that the aristocracy really does have its own manly virtues (one wonders whether aristocratic women also aspire to those virtues, in Oman's view?) and that those render aristocrats more prone to violence (or at least conflict) than commoners. Oman offers some dated anecdotal

⁹⁷ *Id.* at 45.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 99.

¹⁰¹ *Id.* at 135.

¹⁰² *Id.*

¹⁰³ *Id.* at 44, 47.

¹⁰⁴ *Id.* at 47.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 48.

evidence to back up this claim¹⁰⁷ but it is inadequate to establish the sweeping proposition that the ideals of personhood that aristocrats embraced were different from those that prevailed elsewhere in the social hierarchy. Rival accounts might hold, for example, that a common moral code required different behaviors of aristocrats and tradespeople given disparate circumstances,¹⁰⁸ or that aristocrats faced unique incentives,¹⁰⁹ or one might even doubt the empirical contention that there was in fact more conflict among aristocrats than within other social groups.¹¹⁰ The claim that manly aristocratic virtues are at odds with market mores is confusing too because, though aristocrats were not out in the market square trading, they were involved in markets, broadly speaking.¹¹¹ Aristocratic women were probably far more removed from market participation¹¹² but Oman does not offer evidence to suggest that they were the group most prone to violence and internal conflict.¹¹³

Oman's claim is still more dubious as applied to contemporary societies.¹¹⁴ It is hard to imagine anyone entirely removed from the market in societies that are now so decidedly market-driven but it is not apparent that market participation ameliorates conflict or even violence.¹¹⁵ Indeed, the fiercest competition sometimes

¹⁰⁷ See *id.* at 47–49.

¹⁰⁸ See *id.* at 44, 48–49.

¹⁰⁹ See *id.* at 44, 54.

¹¹⁰ See *id.* at 47–49.

¹¹¹ See *id.* at 48; James F. Searing, *Aristocrats, Slaves, and Peasants: Power and Dependency in the Wolof States*, 21 INT'L J. AFR. HIST. STUD. 475, 478 (1988) (describing how the Wolof nobility produced food crops in large-scale productive units).

¹¹² But see Anastasia B. Crosswhite, *Women and Land: Aristocratic Ownership of Property in Early Modern England*, 77 N.Y.U. L. REV. 1119, 1121–22 (2002) (discussing how some elite women owned, controlled, and bequeathed significant amounts of property).

¹¹³ See, e.g., Caroline Castiglione, *Extravagant Pretensions: Aristocratic Family Conflicts, Emotion, and the 'Public Sphere' In Early Eighteenth-Century Rome*, 38 J. SOC. HIST., 685, 685 (2005) (telling the story of how a cardinal in the Roman Catholic Church successfully plotted to kidnap his niece).

¹¹⁴ See *infra* text accompanying notes 116–18.

¹¹⁵ See, e.g., Joseph Goldstein & Nate Schweber, *The Motive in a Manhattan Shooting? The Statue of Liberty*, N.Y. TIMES (May 28, 2017), <https://www.nytimes>

leads to violence that seems almost anomalous and makes the rest of society look genteel in comparison.¹¹⁶ Think of the recent violence observed in connection with competition among Ellis Island ferry services.¹¹⁷

Although this reader was skeptical about Oman's claim about market virtues as an alternative to aristocratic manly virtues,¹¹⁸ I found compelling his more general claim that markets are a platform for cooperation among people who are otherwise quite different.¹¹⁹ Along these lines, Oman argues that "markets are a powerful alternative to politics for pursuing collective projects with those whom we might disagree violently with."¹²⁰ He elaborates that "[m]arket participants ... do not appeal to the passions, convictions, and deepest beliefs of those with whom they deal. ... In offering a means by which people cooperate with those whose beliefs they otherwise despise, markets provide powerful incentives to control the very forces that disturb the sleep of liberal theorists."¹²¹

Oman's account of the attitudes of "[t]hose who are socialized into the norms of a well-functioning market"¹²² is interesting for the potential it identifies. However, it is both theoretically uncertain and, unfortunately, it does not appear to describe the attitudes of contemporary Americans.¹²³ He claims that properly socialized citizens will

feel that there is something gauche about inquiring into the religious or moral beliefs of the supermarket cashier and refusing patronage on the basis of his or her answer. Likewise, people who habitually participate in the market are likely to find it entirely natural and unremarkable that they often buy and sell with those holding radically different conceptions of the ultimate good.¹²⁴

.com/2017/05/28/nyregion/manhattan-statue-of-liberty-ticket-sellers.html [https://perma.cc/W8HX-K5Q8].

¹¹⁶ *See, e.g., id.*

¹¹⁷ *See id.*

¹¹⁸ *See OMAN, supra* note 8, at 48–49.

¹¹⁹ *See id.* at 54.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.* at 58.

¹²³ *See id.* at 56–57.

¹²⁴ *Id.* at 58.

But though people may regularly deal with people different from themselves in the market, it is not clear that the kind of interactions that those dealings inspire are as salutary as Oman suggests.¹²⁵ It might turn out that our contractual dealings with those of a similar demographic type are most likely to comport with Oman's expectations with respect to contractual relationships generally, while many cross-group interactions reinforce rather than mollify perceptions of otherness.¹²⁶ To the extent this is true, our experiences in contract are driven by our social identity with the result that those experiences actually reinforce social stratification.¹²⁷ Contract would not serve the expansionary purpose that Oman imputes to it.¹²⁸

Moreover, though this reader shares Oman's intuitions about "good" behavior on the market, one is left wondering how Oman reacts to the very real phenomenon of people preferring not to sell to people of a different race (though now required by law to do so)¹²⁹ or people of a different sexual orientation (not yet clearly required by law to do so).¹³⁰ These "conscientious objectors" to civil equality laws are tradespeople.¹³¹ Looking further back, we see that market societies have amassed colonies through which they systematically extracted wealth from other societies, using decidedly unpeaceable means.¹³² One wonders, is it market participation that drives people to the liberal premise of moral equality? Or, does a legal infrastructure of civil equality enable the market, by forcing open trade with people different from ourselves until we come to see them as not so different after all? Perhaps, it is politics

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *See id.* at 56–58.

¹²⁸ *See id.* at 58.

¹²⁹ *See* Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a–2000h-6 (2012)).

¹³⁰ *See* *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 370 P.3d 272 (Colo. App. 2015), *cert. granted*, 137 S. Ct. 2290 (2017) (No. 16-111).

¹³¹ *See* *Masterpiece Cakeshop, Ltd.*, 370 P.3d at 272, 276–77; S.M., *Can a baker refuse to make a gay wedding cake?*, THE ECONOMIST: DEMOCRACY IN AMERICA (July 7, 2017), <https://www.economist.com/blogs/democracyinamerica/2017/07/just-desserts> [<https://perma.cc/UCQ5-RWDW>].

¹³² *See* OMAN, *supra* note 8, at 60–61.

that sets the boundaries around the select people to whom market norms apply.¹³³

Oman's final account of how markets contribute to virtue might be the one that many people in wealthy, liberal democracies might suspect: money itself might make us good.¹³⁴ The proposition sounds subversive, but is plausible: need can drive people to do things that they would otherwise deplore.¹³⁵ The rich can be charitable.¹³⁶ They can afford to abide by habits and principles to which others merely aspire.¹³⁷

There are probably many respects in which this is just right. The crushing effects of poverty may exhaust the will and crowd out some lofty ambitions;¹³⁸ financial anxiety can even compromise the pursuit of self-interest.¹³⁹ But wealth, like most all-encompassing circumstances in which people of vastly different moral composition find themselves, is surely ambiguous in its effect on character.¹⁴⁰ For some, it is desirable as a means by which to pursue a variety of life projects,¹⁴¹ including ones that would qualify as "good" in the eyes of most others.¹⁴² But wealth is a less reliable means by which to promote goodness itself than Oman suggests.¹⁴³ In some hands, it appears to breed greed, contempt, a misplaced sense of superiority and entitlement.¹⁴⁴ As was true of the other methods by which the market is argued to

¹³³ *See id.* at 57–58.

¹³⁴ *See id.* at 66.

¹³⁵ *See id.* at 59.

¹³⁶ *See* Dan Kadlec, *Wealthy People Are Giving More of Their Money*, TIME: MONEY (Oct. 25, 2016), <http://time.com/money/4543503/wealthy-giving-money-philanthropy/> [<https://perma.cc/B3CD-NE4F>].

¹³⁷ *See* OMAN, *supra* note 8, at 59.

¹³⁸ *See id.*

¹³⁹ *See* EL DAR SHAFIR & SENDHIL MULLAINATHAN, SCARCITY: WHY HAVING TOO LITTLE MEANS SO MUCH 116–18 (2013).

¹⁴⁰ *See* OMAN, *supra* note 8, at 21.

¹⁴¹ *See* Kadlec, *supra* note 136.

¹⁴² *See id.*

¹⁴³ *See* Paul K. Piff et al., *Higher Social Class Predicts Increased Unethical Behavior*, 190 PNAS 4086, 4086 (2012) (finding that wealthy, upper-class individuals were more likely to engage in unethical behaviors such as stealing valued goods).

¹⁴⁴ *Id.*

promote good people and just politics, the truth is more mixed than Oman's account would have us believe.¹⁴⁵ The next Part raises a more general challenge to the happy picture he paints.¹⁴⁶

II. CONTRACT AS DOMINATION

The previous section aimed to present Oman's narrative of market-based virtue with some combination of sympathy and skepticism.¹⁴⁷ This Part aims to offer a contrasting picture of the ethical world of markets.¹⁴⁸ As was true of the more optimistic account studied above, it is hard to know which features of market relationships are best understood as characteristic of markets as such and which are better attributed to the institution of contract.¹⁴⁹ Markets might have a general ethos that informs how individuals interact within its parameters¹⁵⁰ or contract law might entrench certain expectations and thereby structure interpersonal relationships.¹⁵¹ I will not attempt to tease apart market and contract in this Part either, but only acknowledge that the implications of the narrative below might require some progress on that abandoned front.

The more worried narrative of market ethics starts with the fact that the great wealth generated by markets is distributed very unevenly.¹⁵² In advanced industrialized democracies, tax and transfer regimes and labor market interventions help dampen the socially stratifying work of markets¹⁵³ but almost everywhere inequality is rampant.¹⁵⁴ I am not claiming that markets produce

¹⁴⁵ See *infra* Part II.

¹⁴⁶ See *infra* Part II.

¹⁴⁷ See *supra* Part I.

¹⁴⁸ See *infra* Part II.

¹⁴⁹ See *supra* Part I.

¹⁵⁰ OMAN, *supra* note 8, at 167.

¹⁵¹ JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW* 76 (2011).

¹⁵² BRIAN KEELEY, *INCOME INEQUALITY: THE GAP BETWEEN RICH AND POOR*, OECD INSIGHTS 21, 68 (2015).

¹⁵³ For a classic account of how different kinds of capitalist democracies pursue this strategy, see generally GÖSTA ESPING-ANDERSEN, *THE THREE WORLDS OF WELFARE CAPITALISM* (1990).

¹⁵⁴ See KEELEY, *supra* note 152, at 10.

inequality, since pre-market societies were also vastly unequal.¹⁵⁵ My claim is the more limited and uncontroversial one that markets operate on vast inequality, whether it is properly regarded as inequality of its own making or not.¹⁵⁶

Every market interaction is thus informed by the inequality in the background.¹⁵⁷ This is not an overstatement but simply reflects the way markets work.¹⁵⁸ People bring the resources they have to the market.¹⁵⁹ Their ability to buy and sell—that is, what they sell and to whom on what terms—is all a function of the market.¹⁶⁰ The result is that the claims that individuals make on each other in a market society are driven fundamentally by their marketability.¹⁶¹ People who have more resources are entitled not just to more things against the world,¹⁶² but also, by virtue of the individual contracts they enter, they are entitled to different things from particular other people, including different services and promises of disparate quality.¹⁶³ People are ethically marked by the market in that what they expect from others, what they come to believe they are owed by others, and what they come to accept that they owe others is all depend on their economic position.¹⁶⁴

This ethical marking is problematic in itself—because neither exaggerated nor decimated self-esteem is admirable—but it also threatens to undermine the social bases for self-respect that is fundamental to liberal justice.¹⁶⁵ It makes it almost impossible to achieve equality of opportunity over generations,¹⁶⁶ another

¹⁵⁵ Samuel Bowles et al., *The Emergence and Persistence of Inequality in Premodern Societies*, 51 CURRENT ANTHROPOLOGY 7, 7 (2010).

¹⁵⁶ See KEELEY, *supra* note 152, at 32 (noting that inequality is evident in rich, emerging and developing economies).

¹⁵⁷ *Id.*

¹⁵⁸ See *infra* text accompanying notes 160–65.

¹⁵⁹ See THOMAS SOWELL, BASIC ECONOMICS: A COMMON SENSE GUIDE TO THE ECONOMY 13, 16–17, 19 (4th ed. 2011).

¹⁶⁰ *Id.*

¹⁶¹ See *supra* text accompanying notes 30–31.

¹⁶² See *supra* text accompanying notes 30–31.

¹⁶³ See Aditi Bagchi, *Unequal Promises*, 72 U. PITT. L. REV. 467, 492–93 (2011) [hereinafter Bagchi, *Unequal Promises*].

¹⁶⁴ *Id.* at 493.

¹⁶⁵ See RAWLS, *supra* note 60, at 62, 440.

¹⁶⁶ See Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSP. 79, 79–80, 97 (2013).

precept of liberal justice.¹⁶⁷ And vast disparities in resources and social status undermine the common understanding of moral equality among all persons that is the essence of democratic thinking.¹⁶⁸

The insidious effects of the market can also be viewed at the ground level, through the window of individual contractual relationships.¹⁶⁹ Those relationships are formally cooperative, but they often amount to a kind of domination.¹⁷⁰

Promises are sometimes regarded as a kind of delegation of authority to promisees whereby the latter assume the power to either insist or release promisors from performance, though they had no such power before the promise was made.¹⁷¹ Autonomy-based theories of promise sometimes celebrate this delegation of authority as a respectful relation, and perhaps a moment of self-discipline by promisors.¹⁷² But any delegation of authority in contract is driven primarily by necessity.¹⁷³ Although promises in the marketplace are made to navigate society and amass the best one can have from what one begins with,¹⁷⁴ this process is dispiriting for many who find that what they can have falls systematically short of what they want, or even what socially driven expectations have led them to believe they need.¹⁷⁵ Thus, the exercise of the normative power of promise is not so happy an expression of normative power that the standard narrative in contract might lead us to think. While it is formally the case that one's obligations in contract, including one's obligations to a particular employer, are new upon contract formation,¹⁷⁶ the urgent need to find employment of one sort or another so constrains the choice to enter into any single offer of employment that it is misleading to describe one's subsequent obligations to one's

¹⁶⁷ See RAWLS, *supra* note 60, at 84.

¹⁶⁸ See MICHAEL J. PERRY, *THE POLITICAL MORALITY OF LIBERAL DEMOCRACY* 61 (2010).

¹⁶⁹ See Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943).

¹⁷⁰ *Id.*

¹⁷¹ See Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 96–97, 109 (Gregory Klass et al. eds., 2013).

¹⁷² *Id.*

¹⁷³ See Bagchi, *Justice and Contract*, *supra* note 16, at 208.

¹⁷⁴ See Bagchi, *Unequal Promises*, *supra* note 163, at 489–90, 493.

¹⁷⁵ *Id.* at 493.

¹⁷⁶ See Bagchi, *Justice and Contract*, *supra* note 16, at 208.

employer entirely of one's own making.¹⁷⁷ Similarly, though the obligations that firms might have to consumers might be formally generated by retail contracts,¹⁷⁸ the relative position of consumers is more relevant to any one consumer's experience as a retail promisee than the baseline that no particular firm owed that consumer anything prior to contract.¹⁷⁹ The 'winning' of a promise from a firm will not be compared by any consumer to the status quo whereby the firm owed that consumer nothing but instead to the kinds of commitments other consumers in society have secured.¹⁸⁰ And perhaps, because of the disproportionate impact of the wealthiest social groups on public consumer culture,¹⁸¹ the subjective experience of such comparison will often lead to perpetual disappointment.¹⁸² Market participation allows some people to express their preferences, even their identities, and to command the interest and attention of others; but brute necessity puts many consumers at the mercy of the marketplace.¹⁸³ Their economic participation in civil society is not agency-enhancing in a phenomenological sense.

Importantly, the experience of contractual domination is not limited to the moment of formation, at which time the power exerted by one party over the other is not derived from any contract between them.¹⁸⁴ Domination after contract formation is arguably more general—not limited to contracts between members of disparate economic position—and it is sourced from contract itself.¹⁸⁵

Many contracts are executed seamlessly and without regret or even prolonged consideration of the contract itself.¹⁸⁶ But many contracts are long-term contracts that impose either fixed obligations on a single party with dire consequences upon breach

¹⁷⁷ See Bagchi, *Unequal Promises*, *supra* note 163, at 474–75.

¹⁷⁸ *Id.* at 480.

¹⁷⁹ *Id.* at 492.

¹⁸⁰ *Id.* at 493.

¹⁸¹ Malla Pollack, *Your Image Is My Image: When Advertising Dedicates Trademarks to the Public Domain—With an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1391, 1401 n.41 (1992).

¹⁸² Bagchi, *Unequal Promises*, *supra* note 163, at 484–85.

¹⁸³ *Id.* at 490.

¹⁸⁴ *Id.* at 491–92.

¹⁸⁵ *Id.* at 468–69, 492.

¹⁸⁶ Edith R. Warkentine, *Beyond Unconscionability: The Case for Using "Knowing Assent" as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 SEATTLE U. L. REV. 469, 469–70 (2008).

(*e.g.*, mortgages)¹⁸⁷ or confer a great deal of discretion on one party (*e.g.*, employment).¹⁸⁸ Some contracts do not have a power balance that would have been predictable at the time of contract formation, but circumstances evolve in unexpected ways to render the contract an instrument of control from one side (*e.g.*, supply contracts for an unstable supplier).¹⁸⁹

For a myriad of good reasons, contract law does not attempt to balance out the power between contracting parties either at the moment of contract formation or over the course of contract performance.¹⁹⁰ Parties are free to extract the share of the transactional surplus that their market position makes possible, and beyond enforcing a duty of good faith performance, courts will enforce substantial and sometimes capricious exercises of discretion.¹⁹¹ They will honor the strict controls that parties will subject themselves to at the hands of other parties.¹⁹²

My aim here is not to denounce a contract law that puts people so much at the mercy of other private persons. There are changes we can make in the background, and even in contract law at the margin, that might ameliorate these problems.¹⁹³ But by and large, these are inescapable consequences of the contract-market model,¹⁹⁴ a model that—as Oman has eloquently demonstrated—generates many benefits for society as well, including in the ethical realm.¹⁹⁵ Nevertheless, just as Oman is right that we should appreciate the work that markets do for us as persons and citizens,¹⁹⁶ we should periodically pause to contemplate how markets might erode the subjective experience of equality and freedom that liberal democracy posits as our ideal.¹⁹⁷

¹⁸⁷ Roberta Rosenthal Kwall, *Retained Jurisdiction in Damage Actions Based on Anticipatory Breach: A Missing Link in Landlord-Tenant Law*, 37 CASE W. RES. L. REV. 273, 312–14 (1986).

¹⁸⁸ Stanley J. Brown & Henry Morris, Jr., *Employment at Will*, 10 DIST. LAW 42, 42 (1985).

¹⁸⁹ Bagchi, *Unequal Promises*, *supra* note 163, at 492.

¹⁹⁰ See Warkentine, *supra* note 186, at 471–72.

¹⁹¹ See, *e.g.*, Kwall, *supra* note 187, at 315.

¹⁹² Bagchi, *Unequal Promises*, *supra* note 163, at 478.

¹⁹³ See *supra* Part II.

¹⁹⁴ See *supra* Part I.

¹⁹⁵ OMAN, *supra* note 8, at 43.

¹⁹⁶ *Id.* at 184.

¹⁹⁷ See *supra* Part II.

CONCLUSION

I do not doubt that contract contributes to the cultivation of certain virtues.¹⁹⁸ But it might be ironic that Oman focuses on the ethical contributions of contract within markets.¹⁹⁹ Because, in light of how markets function, it might be that contract ends up fostering quite a bit of vice as well.²⁰⁰ It is not possible to cash out these virtues and vices against one another,²⁰¹ and in any event, assessing the impact of contract on character requires some kind of counterfactual against which to compare its work;²⁰² we have no plausible counterfactual available.²⁰³ We are left, then, with an imperative to speculate as intelligently as possible as to the effects of specific contractual rules or practices on the margin, so that individual doctrines and perhaps, more importantly, individual contracting practices can be tweaked accordingly.²⁰⁴

Oman has taken us several great strides in this direction.²⁰⁵ More important even than the particular accounts of how markets might generate good or stabilize liberal democracy, is the shift in emphasis he ushers.²⁰⁶ Oman is right that markets breed virtues that enable liberal democratic politics,²⁰⁷ and he is also right to raise up the neglected link of private virtue between markets and politics.²⁰⁸ Politics depends on people,²⁰⁹ and we are made—individually and as a collective—by the structures in which we encounter one another.²¹⁰ For better or for worse, the marketplace is where the subjects of modern liberal democracies are forged.²¹¹

¹⁹⁸ OMAN, *supra* note 8, at 40.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 35–36.

²⁰¹ *Id.*

²⁰² *Id.* at 41–42.

²⁰³ *Id.*

²⁰⁴ *Id.* at 45–46.

²⁰⁵ *Id.* at 183–84.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 184.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 49.

²¹⁰ *Id.* at 46–47.

²¹¹ *Id.* at 49.