

DOES CONTRACT LAW NEED MORALITY?

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ABSTRACT

In The Dignity of Commerce, Nathan Oman sets out an ambitious market theory of contract, which he argues is a superior normative foundation for contract law than either the moralist or economic justifications that currently dominate contract theory. In doing so, he sets out a robust defense of commerce and the marketplace as contributing to human flourishing that is a refreshing and welcome contribution in an era of market alarmism. But the market theory ultimately falls short as either a normative or prescriptive theory of contract. The extent to which law, public policy, and theory should account for values other than economic efficiency is a longstanding debate. Whatever the merits of that debate, we conclude that contract law does not need morality as envisioned by Oman—a fluid, subjective, and seemingly instinctual approach to the morality of markets.

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INTRODUCTION

In *The Dignity of Commerce*, Nathan Oman sets out an ambitious market theory of contract (hereinafter Market Theory), which he argues is a superior normative foundation for contract law than either the moralist or economic justifications that currently dominate contract theory.¹ According to the Market Theory, contract law ought to be structured to support well-functioning markets because such markets are morally desirable.² The moral virtues of markets thus mark both the purpose and limits of contract law.³ If contract law exists to support well-functioning markets because such markets are morally valuable, then it follows that the law should not support immoral or, as termed by Oman, “pernicious” markets.⁴

The significance of this effort should not be understated. A clear normative foundation is essential to the understanding and application of contract law.⁵ Only through a theory of why the law enforces contracts can one determine, for example, which promises should be enforced and which should not, how to calculate damages for breach, and the circumstances under which performance will be excused.⁶ *The Dignity of Commerce* thus confronts questions that are both theoretically difficult and of practical importance to courts and lawmakers.

I. THE DIGNITY OF MARKETS (AND CONTRACT)

One of the book’s most important contributions is its emphasis on the positive role played by markets and thus, by extension, of contracts.⁷ In an era rife with warnings about the market’s dangers to society,⁸ Oman’s cogent reminder of the market’s benefits is both refreshing and welcome. Oman also correctly emphasizes

¹ NATHAN B. OMAN, *THE DIGNITY OF COMMERCE* 21 (2016).

² *Id.*

³ *Id.* at 8.

⁴ *Id.* at 160.

⁵ See ERIC A. POSNER, *CONTRACT LAW AND THEORY* 227 (2d ed. 2016).

⁶ *Id.*

⁷ See OMAN, *supra* note 1, at 23.

⁸ *E.g.*, MICHAEL J. SANDEL, *WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS* 11–12 (2012).

contract law's important contribution to proper market functioning.⁹ Although this point is recognized in economic treatments of contract law,¹⁰ Oman argues that it has not been accorded sufficient attention, by either economic or moralist theories of contract.¹¹

Less recognized in the literature is the market's (and, therefore, contract's) often forgotten role in organizing productive social interactions, and it is here that Oman's treatment really shines.¹² These social benefits, Oman argues, are so important that it is these benefits—rather than a commitment to markets in and of themselves—that justify the use of state resources to support markets, and thus contracts.¹³

The Dignity of Commerce is descriptive, normative, and prescriptive all at once. This is both a strength and weakness of the book. Oman's account is, at least in theory, more comprehensive than the competing theories he seeks to replace. Both moralist and economic justifications for contract law have, for example, been criticized as providing a poor, or at least incomplete, descriptive account of contract law.¹⁴ Oman's descriptive account, by recognizing that conceptions of morality and blameworthiness impact contract law, provides a descriptively more appealing account than theories that contend that contract law is explained solely by economic considerations or solely by moral ones.¹⁵

But this insight is not new. Practitioners of law and economics have long recognized that judges and lawmakers, being largely

⁹ See OMAN, *supra* note 1, at 16.

¹⁰ See, e.g., Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1115, 1152 (1998) (explaining how third-party enforcement of contracts facilitates the emergence of sophisticated capital markets); Kimberly D. Krawiec, Wenhao Liu, & Marc L. Melcher, *Contract Development in a Matching Market: The Case of Kidney Exchange*, 80 LAW & CONTEMP. PROBS. 11, 20 (2017) (discussing the positive role played by contracts in various markets, including matching markets).

¹¹ OMAN, *supra* note 1, at 13.

¹² See *id.* at 11, 15.

¹³ *Id.* at 15.

¹⁴ See, e.g., Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489–91 (1989) (arguing that moralist theories of contract are irrelevant to wide swaths of contract law, including the choice of default rule); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 830 (arguing that law and economics has failed to provide plausible descriptive theories of many important contract law doctrines).

¹⁵ See OMAN, *supra* note 1, at 11.

untrained in economics, are likely to rely on moral intuitions when reaching results.¹⁶ And Critical Legal Studies (CLS) scholars long have insisted on the indeterminacy of contract law, arguing that contract law outcomes are best explained as a reflection of cultural values, as operationalized by powerful decision makers.¹⁷

The Market Theory is less successful as a normative or prescriptive theory, however. As we will show, Oman makes moral judgments about the validity of certain markets (and, therefore, certain contracts) without providing a theoretical framework to replace either the moralist or economic theories he rejects.¹⁸ As a result, the Market Theory fails to provide meaningful guidance to courts, policymakers, or scholars confronted with the more difficult questions facing contract law.¹⁹

II. THE LIMITS OF MARKETS (AND CONTRACT)

Under the Market Theory, contract law exists to strengthen and support markets.²⁰ However, markets are not ends in themselves.²¹ Instead, the law supports markets only because and to the extent that markets provide other moral virtues.²² Therefore, unlike the economic analysis of law that it seeks to replace, the Market Theory of contract is deeply interested in normative questions of morality.²³ According to Oman:

Markets can be evil. Just as well-functioning markets have important moral consequences, pernicious markets can cause harm, destroy valuable social and personal goods, and invade aspects of life that should be separated from commerce. ... [*P*]ernicious markets mark the limits of contract law. If contract law ought to be structured to support well-functioning markets because such markets are morally valuable, it follows that, when markets are pernicious, the justification for contract law fails—or at the

¹⁶ POSNER, *supra* note 5, at 233.

¹⁷ See, e.g., Girardeau A. Spann, *A Critical Legal Studies Perspective on Contract Law and Practice*, ANN. SURV. OF AM. L. 257 (“Legal decisions are guided by the invisible hand of our complex cultural values, operating through their embodiment in our social decision makers.”).

¹⁸ See *infra* text accompanying notes 56–61.

¹⁹ See *infra* text accompanying notes 42–48.

²⁰ OMAN, *supra* note 1, at 16.

²¹ See *id.* at 15.

²² *Id.* at 16.

²³ See *id.* at 11, 16.

very least weakens dramatically. *The market argument thus accounts for the universal limitations that we observe in all legal systems on the enforcement of contracts.* It also focuses our attention on the question that we must ask in order to understand the limits of contract law: When are markets pernicious?²⁴

For reasons that we detail below, however, the concept of “pernicious markets” has been widely contested.²⁵ Indeed, entire books challenge the premise that market trading can introduce wrongs into a previously unproblematic activity.²⁶ Some *activities or actions* may be pernicious, of course, particularly when they impose harm on third parties.²⁷ The law discourages many of these activities by making them illegal. But this is a statement about the evils of the underlying *activity*, rather than a statement about the evils of a particular *market*.²⁸

As we will show in Sections A–B, Oman’s purported examples of evil markets are actually examples of evil activities (although, as we detail in Sections B–C, Oman provides no criteria for determining the evilness of any given activity).²⁹ Accordingly, the market argument does not delineate the limits of contract, nor can it “account for universal limitations that we observe in all legal systems on the enforcement of contracts[,]” except perhaps to say that contract enforcement depends on the prevailing norms, prejudices, and culture of the relevant legal regime.³⁰

A. *Evil Markets Versus Evil Activity: Slavery*

Oman invokes the example of involuntary servitude and of the Atlantic slave trade, in particular, a number of times as an

²⁴ *Id.* at 160–61 (emphasis added).

²⁵ See, e.g., JASON BRENNAN & PETER M. JAWORSKI, *MARKETS WITHOUT LIMITS: MORAL VIRTUES AND COMMERCIAL INTERESTS* 16, 18, 92–93 (2016) (arguing that the market does not transform moral acts into immoral ones); Kimberly D. Krawiec, *Foreword: Show Me the Money: Making Markets in Forbidden Exchange*, 72 *LAW & CONTEMP. PROBS.* i, vi (2009) (demonstrating the cultural and historical dependence of views regarding which items properly “belong” in the marketplace).

²⁶ See generally BRENNAN & JAWORSKI, *supra* note 25.

²⁷ See *infra* text accompanying notes 33–35.

²⁸ See *infra* Section II.A.

²⁹ See *infra* Sections II.A–C.

³⁰ OMAN, *supra* note 1, at 160–61.

illustration of a morally evil market that contract law should not support.³¹ According to Oman:

The Atlantic slave trade is one of the great moral catastrophes of history. Its scale and the brutality of its conditions, for example, dwarf other instances of human slavery. Unlike tragedies such as the Holocaust or the mass murders perpetrated by Stalin, Mao, and Pol Pot, *the slave trade was fundamentally a market atrocity*. ... It provides the best historical example of a pernicious market. Whatever benefits the commerce in humans might have conferred on merchants or planters, it cannot erase the human misery and degradation wrought by the slave trade. Given the evils of such a market, the law should not have supported it. *Accordingly, one should not enforce contracts for the sale of slaves*.³²

Yet, Oman's slavery example tells us very little about the limits of markets or of contract law, because slavery is an example of a pernicious practice, not a pernicious market. Forced slavery is almost universally considered wrong, not because of market trading, but because to own another human being is inconsistent with basic morality and human rights.³³ This conclusion is not dependent on the existence of market trading in slaves and would hold even if the law prohibited the sale of slaves but permitted their acquisition and ownership through other means. If, for example, slaves could be inherited, but not sold, or if a society were to permit the gifting of slaves to commemorate holidays and birthdays, but banned the commercial slave trade, no dominant moral theory would suggest that the absence of market trading renders slavery moral.³⁴

This is because slavery is an immoral practice, without regard to the presence or absence of market trading. If it is immoral to own slaves, gift slaves, or devise slaves by will, then it follows that it is also immoral to trade in slaves and, it logically follows, that such contracts should not be enforced. But notice that this conclusion has nothing to do with slavery *as a market*. To be sure,

³¹ *Id.* at 163.

³² *Id.* (emphasis added).

³³ G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 4 (Dec. 10, 1948).

³⁴ *Id.* (prohibiting both the slave trade and the holding of another in servitude or slavery).

there is somewhat more debate surrounding the morality of voluntary servitude, such as bonded labor.³⁵ But this is not the debate on which Oman relies for insights about the limits of markets, invoking instead the example of the Atlantic slave trade.³⁶

A few examples will highlight the difference between forced slavery and transactions that are not considered immoral in the absence of commercial trading. There are certain items and activities whose exchange is not only permitted, but applauded, when motivated by a purpose other than profit-seeking—love, altruism, kindness, or a sense of duty, for example.³⁷ In fact, a failure to provide these goods and services in the context of certain relationships may be condemned as selfish or self-indulgent.³⁸ A decision to carry and give birth to a child for my infertile sister is likely to be lauded as compassionate and charitable.³⁹ A failure to donate a life-saving kidney to my dying brother will strike some as inexcusably selfish. Selling either in a commercial transaction is morally contested and often illegal.⁴⁰ In each case, it is the involvement of the market that generates discomfort with the transaction, rather than the transaction itself.

Oman seems to believe that because the marketplace exacerbated slavery's evils, "the slave trade was fundamentally a market atrocity."⁴¹ But the simple exercise of questioning whether we would approve of slavery in the absence of market trading suggests that this is not the case. And a new and elaborate market-based theory of contract is unnecessary to reach that result.

B. The Digital Pedophile and the Indebted Gambler

Like slavery, the digital pedophile is an example that Oman frequently invokes as an example of an evil market that contract law should not support.⁴² Says Oman:

³⁵ See generally DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE, Ch. 8 (2010) (detailing this debate).

³⁶ See OMAN, *supra* note 1, at 163–64.

³⁷ Kimberly D. Krawiec, *A Woman's Worth*, 88 N.C. L. REV. 1739, 1740 (2010).

³⁸ *Id.*

³⁹ *Id.* at 1741 (discussing the taboo nature of commercial surrogacy).

⁴⁰ Kieran Healy & Kimberly D. Krawiec, *Repugnance Management and Transactions in the Body*, 107 AM. ECON. REV.: PAPERS & PROCEEDINGS 86, 86–87 (2017).

⁴¹ OMAN, *supra* note 1, at 163.

⁴² *Id.* at 12.

[T]he satisfaction of evil preferences is not morally desirable. The world is not better if a twisted sadist can indulge his desire to watch violent child pornography, even if no children are harmed and the twisted sadist's actions have no other third-party effects.⁴³

As Oman recognizes, traditional economic analysis would consider this transaction welfare enhancing, under the conditions specified by Oman—the sadist is made better off, and no one else is made worse off.⁴⁴ The digital pedophile's actions are thus Pareto improving. Indeed, Oman specifically invokes the digital pedophile example to illustrate what he perceives as a central flaw in the economic theory of contract—its lack of attention to questions of morality.⁴⁵

But Oman never explains why the world is not better off if the twisted sadist can satisfy his preferences with no negative third-party effects, simply asserting it as if the answer is obvious.⁴⁶ But the answer is far from obvious. Indeed, even the U.S. Supreme Court struggled with this question, before declaring a statute prohibiting digital, or virtual, child pornography unconstitutional.⁴⁷

For many theorists, of course, efficiency is not the only, or even the primary, relevant criterion for judging the value of any particular market or transaction.⁴⁸ But, a rigorous debate about whether the world is made better off by the satisfaction of a digital pedophile's preferences needs to be grounded on some evaluation criteria. Because the Market Theory provides no normative basis for reaching its determination that digital child pornography

⁴³ *Id.*

⁴⁴ POSNER, *supra* note 5, at 230–32 (discussing Pareto efficiency).

⁴⁵ OMAN, *supra* note 1, at 12.

⁴⁶ *See id.*

⁴⁷ *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 255–56 (2002). In reaching its decision the Court concluded:

[T]he CPPA prohibits speech that records no crime and creates no victims by its production. Virtual child pornography is not “intrinsically related” to the sexual abuse of children. While the Government asserts that the images can lead to actual instances of child abuse, the causal link is contingent and indirect.

Id. at 250. Six years later, the Court upheld the constitutionality of the Congressional response to the Free Speech Coalition ruling, The Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003. *United States v. Williams*, 553 U.S. 285 (2008).

⁴⁸ *See, e.g., SATZ, supra* note 35, at 182 (discussing the limits of efficiency as a gauge for determining the desirability of many transactions).

is an evil market not worth supporting, it provides no guidance on how courts would, or should, address other transactions in which neither third parties nor the participants to the contract are harmed.

A similar problem arises in Oman's treatment of gambling. According to Oman, Nevada, though famous for gambling and casinos, refuses to enforce contracts creating gambling debts.⁴⁹ Oman speaks with seeming approval of Nevada's policy, noting:

Nevada does not take a paternalistic attitude toward gambling. If its citizens (or visitors from other states) wish to gamble, Nevada does not prohibit them from doing so. It does not follow from this, however, that Nevada must enforce their contracts. ... The litigant calling on the state to enforce a contract is not asking to be left free from interference in his or her private decisions. Rather, he or she is asking that the government act to support the market that will be strengthened by the enforcement of the contract.⁵⁰

Oman is, of course, correct that the mere fact that Nevada permits gambling does not require it to enforce gambling contracts. At common law, cash settled forward contracts were legal, but unenforceable, precisely on the theory that they were speculative contracts, akin to gambling.⁵¹ Today a number of states permit gestational surrogacy arrangements, but refuse to enforce surrogacy contracts.⁵²

But Oman provides no justification to support Nevada's policy.⁵³ Thus the Market Theory, rather than providing a predictive framework for understanding contract, instead seems to suggest that communities will enforce contracts when they believe that the underlying behavior is worthy and will fail to do so when they disapprove of the underlying behavior.

⁴⁹ OMAN, *supra* note 1, at 164.

⁵⁰ *Id.* at 165.

⁵¹ Lynn A. Stout, *Why the Law Hates Speculators: Regulation and Private Ordering in the Market for OTC Derivatives*, 48 DUKE L.J. 701, 714–15 (1998).

⁵² The Center for American Progress provides a summary of surrogacy laws by jurisdiction, showing that some states ban the practice (sometimes with criminal penalties and sometimes not) and others simply declare surrogacy contracts void and unenforceable as against public policy. Center for American Progress, *Guide to State Surrogacy Laws* (Dec. 17, 2007), <https://www.american-progress.org/issues/women/news/2007/12/17/3758/guide-to-state-surrogacy-laws/> [<https://perma.cc/L4HW-5HJ2>].

⁵³ OMAN, *supra* note 1, at 165.

This may indeed be true as a descriptive matter, but is not novel—as already noted, adherents of both law and economics and CLS have recognized this feature of the law.⁵⁴ More importantly, however, the distinction does not appear to be about supporting markets. Oman never argues, for example, that gambling markets fail to provide the social benefits he extols in *The Dignity of Commerce* or provides any other reason for Nevada’s decision that would lend certainty to cases going forward.⁵⁵

C. Taboo Markets

So far, we have shown that the Market Theory, by claiming to draw the line at immoral markets without providing a coherent theory by which to judge that immorality, falls short as both a normative and prescriptive theory of contract law.⁵⁶ In an age of increasing market skepticism, this is a disappointment. Numerous books, academic articles, and popular press pieces have emerged in recent years lamenting a perceived expansion of markets and identifying dozens, if not hundreds, of potentially pernicious markets.⁵⁷ The most prominent voice is perhaps that of Michael Sandel, whose *New York Times* bestseller identifies markets in prison cells, car pool lanes, international surrogacy, rights to shoot endangered species, concierge medicine, carbon emissions, university legacy admissions, military force, line standing, book reading, and dozens of other “new” markets as potentially pernicious.⁵⁸

A Market Theory that celebrated the positive attributes of markets, as *The Dignity of Commerce* surely does, while providing guidance on the appropriate limits of the marketplace would be a welcome contribution to the literature. Unfortunately, Oman’s Market Theory tells us very little about these and other contested

⁵⁴ POSNER, *supra* note 5, at 233; Spann, *supra* note 17, at 257.

⁵⁵ OMAN, *supra* note 1, at 165.

⁵⁶ *Supra* Sections II.A–B.

⁵⁷ See, e.g., SANDEL, *supra* note 8, at 3–5 (2012) (detailing a number of potentially pernicious markets).

⁵⁸ *Id.* at 15. We label such markets “new” because, despite Sandel’s claims of novelty, at least some of the markets identified by Sandel, such as surrogacy, sex work, and mercenaries, are not new at all, while others simply take on a new form, as technological or other changes permit forms of commerce not possible before. See, e.g., Krawiec, *supra* note 37, at 1742, 1747, 1747 n.23 (discussing modern variations on ancient markets).

markets, as fully highlighted in the book's final chapter, which addresses pernicious markets.⁵⁹

Given the prior discussion of gambling contracts and digital pedophiles in Section II.B, one might expect Oman to view traditional taboo markets—such as those for surrogacy services, sex work, and human bodily materials—with skepticism.⁶⁰ After all, these are unquestionably controversial exchanges, criticized by observers around the world and prohibited in many jurisdictions. But this does not appear to be the case.⁶¹ In discussing surrogacy contracts, for example, Oman notes that “[w]e no longer need to speculate about the social effects of surrogacy agreements. Such contracts will be honored in at least some states, and we now have more than a generation of experience with their effects. The dystopian, commodified future feared by Radin has not materialized.”⁶²

To be sure, we agree with Oman's analysis of the evidence on surrogacy arrangements and with his conclusions. Our point is simply that his analysis is inconsistent with the discussion of gambling and digital pedophiles detailed in Section II.B. Recall that in the case of digital pedophiles, Oman condemned the market as immoral, without respect to the costs and benefits of the behavior.⁶³ Yet, in the case of surrogacy contracts, Oman urges us to consider evidence of the market's costs and benefits.⁶⁴ Moreover, Oman seems to overlook what is, to surrogacy critics, the most serious objection to commercial surrogacy and other taboo trades—the corrupting effect on social values.⁶⁵ Such costs are amorphous and not easily identified or measured. Surrogacy critics would thus deny that the evidence proves such fears unfounded.

To reiterate, we agree with Oman's approach to surrogacy contracts and other taboo markets. But then we would also enforce

⁵⁹ See OMAN, *supra* note 1, at 160.

⁶⁰ See *supra* Section II.B.

⁶¹ See OMAN, *supra* note 1, at 170–71.

⁶² *Id.* at 171.

⁶³ See OMAN, *supra* note 1, at 12.

⁶⁴ *Id.* at 171–72.

⁶⁵ MARGARET JANE RADIN, *CONTESTED COMMODITIES* xiii, 142–43 (1996) (arguing that commercial surrogacy is commodifying, reinforces a gender hierarchy and corrupts parent-child relationships more generally); ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 168 (1993) (“[c]ontract pregnancy commodifies both women's labor and children in ways that undermine the autonomy and dignity of women and the love parents owe to children.”)

contracts for digital pornography, assuming the lack of negative externalities posited by Oman. But for opponents of taboo markets, such as Margaret Radin, Elizabeth Anderson, and Michael Sandel, the objections to surrogacy and other taboo markets are similar, if not identical, to the objections to digital child pornography—that it corrupts and demeans not only the participants to the transaction, but society more generally.⁶⁶ Oman’s apparent rejection of these concerns reinforces our sense that his metrics for judging the immorality of markets and transactions are fluid and, perhaps, idiosyncratic. Society’s collective attitude towards any activity, and its collective attitude towards markets in any activity, varies across cultures and time.⁶⁷ But our sense is that the Market Theory seeks to do more than suggest that contract disputes are often resolved against these background cultural norms. If that is correct, then the Market Theory must articulate some systematic and consistent principles in order to succeed as a prescriptive theory of contract.

CONCLUSION

The Dignity of Commerce is an important book on an important topic. Indeed, one of us (Krawiec) has adopted the book as required reading in an Advanced Contracts course for two straight years. Moreover, *The Dignity of Commerce* is particularly timely. We live in a time during which the definition of what constitutes a market has become broader than ever and the number of goods and services distributed through market forces appears to increase almost daily.⁶⁸ These changes are enabled partly by advances in economic theories and partly by modern technology.⁶⁹ But regardless of the underlying drivers, markets play an increasingly significant role in our social and economic activities, replacing some activities traditionally facilitated by idiosyncratic individual efforts, and kindness or altruism.

⁶⁶ See, e.g., RADIN, *supra* note 65, at 133; ANDERSON, *supra* note 65, at 148; SANDEL, *supra* note 8, at 95.

⁶⁷ Alvin E. Roth, *Repugnance as a Constraint on Markets*, 21 J. ECON. PERSP. 37, 37–58 (discussing a variety of “repugnant activities” and the impact of people’s repugnance on the underlying markets).

⁶⁸ ALVIN E. ROTH, WHO GETS WHAT—AND WHY: THE NEW ECONOMICS OF MATCHMAKING AND MARKET DESIGN 15, 20–22, 225 (2015).

⁶⁹ See, e.g., *id.* at 15, 20–23, 225 (discussing these developments).

These changes are alarming to many observers, who believe that they conflict with traditional moral intuitions and threaten to displace nonmarket values and ideals.⁷⁰ Seen in this context, Oman's robust defense of commerce and the marketplace as contributing to human flourishing is a refreshing and welcome contribution.⁷¹ Yet, Oman's Market Theory, which he argues is superior to the moralist and economic philosophies that currently dominate contract theory, is ultimately unsuccessful on its own terms.⁷² To be sure, devising a new theory of contract law is no easy feat, and we applaud the effort. But the Market Theory ultimately falls short as either a normative or prescriptive theory of contract.

To return to the question with which we began, does contract law need morality? This, of course, is an old debate that extends well beyond normative theories of contract law.⁷³ The extent to which law, public policy, and theory should account for values other than economic efficiency is a longstanding debate, and one we need not resolve here.⁷⁴ Instead, we merely conclude that contract law does not need morality as envisioned by Oman—a fluid, subjective, and seemingly instinctual approach to the morality of markets. Although the “I know it when I see it” approach to morality may accurately describe the way courts and lawmakers approach difficult questions of contract law, it has little to do with supporting the moral virtues of markets and fails to provide a prescriptive theory to guide future cases.⁷⁵

⁷⁰ *E.g.*, RADIN, *supra* note 65, at 142–43; ANDERSON, *supra* note 65, at 168.

⁷¹ OMAN, *supra* note 1, at 125.

⁷² *See, e.g., id.* at 8, 11, 16.

⁷³ *E.g.*, SATZ, *supra* note 35, at 182 (rejecting efficiency as the sole measure of the assessment of a market); POSNER, *supra* note 5, at 229–34 (discussing this debate within contract law).

⁷⁴ *Id.*

⁷⁵ *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1963) (Stewart, J., concurring).