

# Contract Law and the Common Good

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# CONTRACT LAW AND THE COMMON GOOD

BRIAN H. BIX \*

## ABSTRACT

*In The Dignity of Commerce, Nathan Oman offers a theory of contract law that is largely descriptive, but also strongly normative. His theory presents contract law's purpose as supporting robust markets. This Article compares and contrasts Oman's argument about the proper understanding of contract law with one presented over eighty years earlier by Morris Cohen. Oman's focus is on the connection between Contract Law and markets; Cohen's connection had been between Contract Law and the public interest. Oman's work brings back Cohen's basic insight, and gives it a more concrete form, as a formidable normative theory with detailed prescriptions.*

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## INTRODUCTION

In *The Dignity of Commerce*, Nathan Oman offers a theory of contract law that is largely descriptive, but also strongly normative.<sup>1</sup> His theory presents contract law's purpose as supporting robust markets.<sup>2</sup> This Article compares and contrasts Oman's argument about the proper understanding of contract law with one presented over eighty years earlier by Morris Cohen, another theory that focused on what contract law should do for us.

Part I summarizes Cohen's argument. Part II compares Oman's analysis with Cohen's, to see where the newer work improves on the older, and where the older work might still have some advantages.

## I. MORRIS COHEN'S "BASIS OF CONTRACT"

In 1933, Morris Cohen published "The Basis of Contract" in the *Harvard Law Review*.<sup>3</sup> Cohen's article is a nice match to Oman's book, in scope, ambition, and learning. Cohen's purpose was to investigate the "nature of contract" in the light of moral philosophy, general social philosophy, political theory, and economics.<sup>4</sup> As in Oman's book, the text travels among both historical lands and historians (Maine, Maitland, and Montesquieu; and Homeric Greece, Biblical Israel, and medieval Italy, just to name a few).<sup>5</sup> From the historical survey, the author draws two conclusions: (1) that Maine's famous observation that law moves from status to contract is "partly true in certain periods of expanding trade;"<sup>6</sup> and (2) "[a]t no times does a community completely abdicate its right to limit and regulate the effect of private agreements, a right that it must exercise to safeguard what it regards as the interest of *all* its members."<sup>7</sup> In the course of his analysis, Cohen also touches on the theme Oman will emphasize at much greater

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<sup>1</sup> NATHAN B. OMAN, *THE DIGNITY OF COMMERCE: MARKETS AND THE MORAL FOUNDATIONS OF CONTRACT LAW* 1 (2016) [hereinafter OMAN, *DIGNITY*].

<sup>2</sup> *Id.*

<sup>3</sup> Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

<sup>4</sup> *Id.* at 553.

<sup>5</sup> *Id.* at 554–58, 574–75.

<sup>6</sup> *Id.* at 558.

<sup>7</sup> *Id.* at 558 (emphasis in original).

length: that commerce and international trade are central to the “expansion of the régime of contract.”<sup>8</sup>

In the course of his analysis, Cohen considered a prominent theory of contract that corresponds to the autonomy theory that Oman considers and rejects:<sup>9</sup> the will theory of contracts.<sup>10</sup> In the United States (unlike Continental Europe),<sup>11</sup> the will theory of contracts had become enmeshed with the partly economic, partly political theory of laissez-faire.<sup>12</sup> So, the article argues on two fronts, against both the will theory<sup>13</sup> and laissez-faire.<sup>14</sup> As to the latter, Cohen found a troubling inconsistency in the advocates of non-intervention: “[t]he same group ... that protests against a child labor law, or against any minimum wage law ... is constantly urging the government to protect industry by tariffs.”<sup>15</sup> Another older variant of a recent theory of Contract Law appears in Cohen’s critique of reliance theories of Contract Law.<sup>16</sup>

In the context of his discussion of laissez-faire approaches to Contract Law, Cohen rejected John Stuart Mill’s drawing of a sharp line between self-regarding actions and other-regarding actions: “[w]hat act of any individual does not affect others?”<sup>17</sup> This in turn leads to what is, arguably, the central point of Cohen’s article:

A contract ... between two or more individuals cannot be said to be generally devoid of all public interest. If it be of no interest, why enforce it? For note that in enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant in their eyes. Enforcement ... puts the

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<sup>8</sup> *Id.* at 557.

<sup>9</sup> OMAN, DIGNITY, *supra* note 1, at 8–9; *cf.* Nathan B. Oman, *Consent to Retaliation: A Civil Recourse Theory of Contractual Liability*, 96 IOWA L. REV. 529 (2011) (arguing for superiority of a civil recourse approach to contract law over autonomy-based approaches).

<sup>10</sup> *See generally* Cohen, *supra* note 3, at 558–62, 575–78; JAMES GORDLEY, THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE 161–229 (1991) (discussing the will theory).

<sup>11</sup> *See* GORDLEY, *supra* note 10, at 161–229.

<sup>12</sup> *See* Cohen, *supra* note 3, at 558–62.

<sup>13</sup> *Id.* at 575–78.

<sup>14</sup> *Id.* at 560, 562.

<sup>15</sup> *Id.* at 561–62.

<sup>16</sup> *See id.* at 578–80. For modern versions of the reliance theory, see GRANT GILMORE, THE DEATH OF CONTRACT 61–63 (Ronald K. L. Collins ed., 1995), & P. S. ATIYAH, ESSAYS ON CONTRACT 87 (Repr., with a new chapter, 1990).

<sup>17</sup> Cohen, *supra* note 3, at 562.

machinery of the law in the service of one party against the other. When that is worthwhile and how that should be done are important questions of public policy. ... [T]he notion that in enforcing contracts the state is only giving effect to the will of the parties rests upon an utterly untenable theory as to what the enforcement of contracts involves.<sup>18</sup>

After a circuit of other theories of Contract Law prominent in his day, Cohen returns to his main theme: “[i]f ... the law of contract confers sovereignty on one party over another (by putting the state’s forces at the disposal of the former) ... [f]or what purposes and under what circumstances shall that power be conferred?”<sup>19</sup> Sometimes, he considered, limits on available terms (e.g., usury laws and non-enforcement of unconscionable terms) or mandatory terms may be what public policy requires.<sup>20</sup>

Cohen’s ultimate conclusion is straightforward: the provision of courts and other enforcement machinery to respond to breaches of contract is an expensive resource.<sup>21</sup> It is reasonable that the state should only provide this resource where enforcement of contracts serves the public interest and withhold this resource for those particular contracts, or categories of contracts, where enforcement would not serve the public interest.<sup>22</sup> The question of social good is foundational under this analysis. Echoing—though not citing—David Hume, Cohen argues that the only reason we have to keep promises and agreements earlier made is “some social good or necessity that is served.”<sup>23</sup>

Both the weakness and the strength of Cohen’s argument is its flexibility. “Enforce what serves the common good” seems as uncontroversial, and as helpful to practical judgment as the prescription “be fair” and “do justice”<sup>24</sup> (or, for that matter, Aquinas’s

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 587.

<sup>20</sup> *Id.* at 587–88.

<sup>21</sup> *Id.* at 586–87.

<sup>22</sup> *Id.* at 587.

<sup>23</sup> *Id.* at 571; cf. David Hume, *Of the Original Contract* (1752), reprinted in FOUNDERS’ CONSTITUTION 49–51 (Philip B. Kurland & Ralph Lerner eds., 2000), <http://press-pubs.uchicago.edu/founders/documents/v1ch2s4.html> [<https://perma.cc/P9TV-RYET>] (arguing that the legitimacy of “social contracts,” like the moral obligation to keep promises or contracts generally, is ultimately grounded on whether they serve the general welfare).

<sup>24</sup> Cohen, *supra* note 3, at 571.

prescription “that good should be done and sought and evil is to be avoided”).<sup>25</sup> We want to know what types of agreements do serve the public interest, and thus warrant enforcement, and we would prefer, to the extent possible, to know this in advance to give greater predictability (and consistency) to enforcement decisions.<sup>26</sup> Cohen does not deny or disregard this.<sup>27</sup> In the course of an article that already deals (briskly) with a large number of topics and approaches, Cohen is more than willing to share his views about government regulation in general, minimum wages, usury laws, mandatory terms in employment and insurance contracts, and many other topics.<sup>28</sup> By way of summation, he adds: “[f]or our present purpose it is sufficient to note that the law of contract in thus dealing with public policies cannot be independent of general political theory.”<sup>29</sup>

## II. THE DIGNITY OF COMMERCE

### A. Overview

Oman’s argument in *The Dignity of Commerce* is, essentially, a market theory of contract.<sup>30</sup> He declares: “well-functioning markets are morally desirable, and contract law should be organized to support such markets.”<sup>31</sup> That is, contracts should be enforced when they support (well-functioning, non-pernicious) markets, and not enforced when they do not.<sup>32</sup>

Markets are valuable, Oman argues, because they produce prosperity, encourage “peaceful cooperation in a pluralistic society and inculcate certain moral virtues.”<sup>33</sup> While Oman finds indications of connections between contract law and markets in some of the American legal realists’ work,<sup>34</sup> in aspects of law and economics

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<sup>25</sup> THOMAS AQUINAS, SUMMA THEOLOGICA, I–II, Question 94, art. 2, corpus, in ST. THOMAS AQUINAS, THE TREATISE ON LAW 247 (R. J. Henle ed., 1993).

<sup>26</sup> Cohen, *supra* note 3, at 587–88.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 561–62, 587–88.

<sup>29</sup> *Id.* at 588.

<sup>30</sup> OMAN, DIGNITY, *supra* note 1, at 1, 183–84.

<sup>31</sup> *Id.* at 1.

<sup>32</sup> *Id.* at 16–17, 160–61.

<sup>33</sup> *Id.* at 16.

<sup>34</sup> *Id.* at 13–14.

scholarship,<sup>35</sup> and in some other contemporary Contract Law theories,<sup>36</sup> he concludes that none of the Contract Law theories make markets sufficiently central.<sup>37</sup>

Anglo-American contract law predates the rise of modern markets—though, of course, commercial exchange has been around longer still, there is no reason to think that the enforcement of promises or exchanges predates it.<sup>38</sup> Of course, Oman, well-read in the history of Contract Law, recognizes this. He observes that “[n]othing as complicated and as historically contingent as the common law of contracts can be said to have a simple origin or represent a single normative concern over the centuries of its history.”<sup>39</sup>

### *B. Two Case Examples*

For all the strengths of Oman’s analysis, I would have preferred more attention to have been paid to the value of being able to give a legally enforceable commitment. Consider the case of *Webb v. McGowin*,<sup>40</sup> which Oman briefly discusses.<sup>41</sup> In an incident at a workplace, Joe Webb saved his boss, J. Greeley McGowin, from serious injury or death, by diverting a large falling block, but in the process suffered severe injuries himself.<sup>42</sup> McGowin subsequently promised to pay Webb a certain amount every two weeks until Webb died.<sup>43</sup> McGowin did so until his own death, but then McGowin’s executors ceased the payments.<sup>44</sup> Webb sued, and ultimately prevailed.<sup>45</sup> However, the court had to go through some analytical gymnastics to get to its result: comparing the outcome to restitutionary recovery for rescued livestock, and applying a presumption that McGowin’s post-accident promise to pay Webb “rais[e] the presumption that the services had been rendered

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<sup>35</sup> *Id.* at 11–12.

<sup>36</sup> *See id.* at 10–11 (discussing the work of Daniel Markovits).

<sup>37</sup> *Id.* at 15.

<sup>38</sup> *Id.* at 5–8.

<sup>39</sup> *Id.* at 8.

<sup>40</sup> 168 So. 196, 196 (Ala. App. 1936).

<sup>41</sup> OMAN, DIGNITY, *supra* note 1, at 108.

<sup>42</sup> *Webb*, 168 So. at 197.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 197.

<sup>45</sup> *Id.* at 199.



at McGowin's request"<sup>46</sup>—that is, a presumption that McGowin somehow negotiated the payment for the rescue *while* the large block was falling.<sup>47</sup> This is obviously factually absurd, but perhaps a paradigmatic use of a legal fiction<sup>48</sup> to get the court to where it wanted to go: enforcement of the promise despite the failure to meet the consideration requirement (consideration will enforce a promise given in exchange for a future action, but not a promise given in response to a past action).<sup>49</sup>

Oman states that the promise in *Webb* was rightly enforced, “because it was made in the context of a healthy market, and its enforcement will serve to strengthen the trust within that market.”<sup>50</sup> It is true that the saving of the life occurred between an employee and an employer, but it was hardly the normal commercial aspects of the employment relationship.<sup>51</sup> The trust that was being increased was the trust that a promise made by a beneficiary would be kept.<sup>52</sup>

The beneficiary of the altruistic act kept the promise throughout his lifetime; the problem came only after his death, when the executor of the estate refused to continue the payments.<sup>53</sup> On this matter (and this is a sentence I did not foresee ever having to use), Richard Posner's analysis is better than Oman's. Posner writes, regarding *Webb*:

The rescued person promised to pay his rescuer \$15 every two weeks for the rest of the rescuer's life. This was a generous gift to the extent that the promise was enforceable but a much less generous one to the extent that it was not. Had the promisor believed that such a promise was unenforceable, he might have decided instead to make a one-time transfer that might have had a much lower present value than had the annuity which he in fact promised. Both parties would have been worse off

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<sup>46</sup> *Id.* at 198.

<sup>47</sup> *See id.* at 198.

<sup>48</sup> *See generally* LON L. FULLER, LEGAL FICTIONS (1967).

<sup>49</sup> Steve Thel & Edward Yorio, *The Promissory Basis of Past Consideration*, 78 VA. L. REV. 1045, 1050 (1992) (“As is so often said, past consideration is no consideration.”).

<sup>50</sup> OMAN, DIGNITY, *supra* note 1, at 108.

<sup>51</sup> *See Webb*, 168 So. at 196.

<sup>52</sup> *See* OMAN, DIGNITY, *supra* note 1, at 108.

<sup>53</sup> *Id.*

by this alternative. Hence, it is not surprising that the court held the promise to be enforceable.<sup>54</sup>

One possible objection to the outcome in *Webb*<sup>55</sup> is that enforcing promises of this sort requires an exception to (or, if one prefers, a supplement to) the requirement of consideration. This objection need not detain us long, for two reasons.<sup>56</sup> First, current doctrine has already established an exception for cases of this sort, and it is widely accepted.<sup>57</sup> Second, Oman himself argues for creating exceptions to the consideration requirement where it serves the larger purpose (in his view, supporting markets).<sup>58</sup>

In the same chapter as the discussion of *Webb*, Oman defends the enforcement of promises for pensions (regardless of reliance), on the grounds that such promises are “in a commercial context in furtherance of economic activity.”<sup>59</sup> Certainly, a pension for a worker is more clearly a “commercial context”<sup>60</sup> than is compensation for a good deed occurring during a workplace accident,<sup>61</sup> but when the payment is made after the employment is over (rather than as part of the initial employment package, or as an incentive to get an employee to retire early), it looks more like an act of altruism or the response to a moral obligation.

Oman is emphatic in rejecting the position proffered here (or something like it): “[w]e should not enforce contracts simply because people desire to impose legal obligations on themselves and a respect for personal autonomy requires that we accede to their wishes.”<sup>62</sup> Throughout Oman’s extended discussion, it is not clear why we should not.<sup>63</sup> We are told, persuasively, that a valuable use of Contract Law is the support of (good) markets.<sup>64</sup> We are told, reasonably, though perhaps not (yet) indubitably,

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<sup>54</sup> Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 419 (1977).

<sup>55</sup> See *Webb*, 168 So. at 198.

<sup>56</sup> See *infra* text accompanying notes 56–58.

<sup>57</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 86 (AM. LAW INST. 1981).

<sup>58</sup> OMAN, DIGNITY, *supra* note 1, at 102–03.

<sup>59</sup> *Id.* at 106.

<sup>60</sup> *Id.*

<sup>61</sup> See *Webb*, 168 So. at 198.

<sup>62</sup> OMAN, DIGNITY, *supra* note 1, at 180.

<sup>63</sup> See *infra* notes 64–65 and accompanying text.

<sup>64</sup> OMAN, DIGNITY, *supra* note 1, at 16.

that this is the most important or most central use of or value for Contract Law.<sup>65</sup> Even granting both claims, it is not clear why Contract Law should not *also* serve the purpose of allowing individuals to make legally enforceable commitments, even if those commitments are not directly connected to well-functioning markets.

Perhaps the concern is that if Contract Law tries to serve the interests individuals might have outside the commercial context, it will undermine the force or effectiveness of the doctrinal area's service of well-functioning markets. There is some plausibility to this, in that resources or attention taken away from supporting markets might dilute the message and confuse contracting parties.<sup>66</sup> There might, of course, also be the occasional case where the interest in supporting well-functioning markets (and *not* supporting pathological markets) conflicts with the interest of individuals in being able to impose legally enforceable obligations on themselves.<sup>67</sup>

Oman's response to another canonical case, *Hamer v. Sidway*,<sup>68</sup> may be instructive here. *Hamer* is the case where the uncle promised to pay his nephew a large sum of money if the nephew gave up a bunch of fun (immoral) activities for a period of time.<sup>69</sup> At trial, the objection to enforcement had been that the nephew had not provided consideration, because in giving up those activities he was benefitting himself.<sup>70</sup> The court, rejecting this argument, held that any giving up of a legal liberty was sufficient for consideration; there was no need to show an objective detriment.<sup>71</sup>

Oman discusses this case in the context of his proposed rule that "the law should presumptively enforce all agreements made in furtherance of commercial activity."<sup>72</sup> He concludes that though the agreement was "not made in furtherance of a commercial transaction and was not made in an established market,"

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<sup>65</sup> *See id.*

<sup>66</sup> *See supra* text accompanying notes 62–65.

<sup>67</sup> *See generally* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (involving the validity of an arbitration agreement between a credit cardholder and a bank).

<sup>68</sup> 27 N.E. 256 (N.Y. 1891).

<sup>69</sup> *Id.* at 256.

<sup>70</sup> *Id.* at 257.

<sup>71</sup> *Id.* at 259.

<sup>72</sup> OMAN, DIGNITY, *supra* note 1, at 102.

it should be enforced, because it was a bargain (exchange), and enforcing exchanges might “assist in the generation of new markets.”<sup>73</sup>

Now, it is true that there might be an emerging market in payments for self-deprivation—though, on the whole, it is not likely. It is also true that allowing parties to make legally enforceable commitments can be valuable, including for uncles who want to give nephews incentives to change their ways (incentives that will be significantly greater if they can be enforced in court).<sup>74</sup> However, it is equally true—and a simpler point—that both parties benefit in such cases from an ability to make legally enforceable agreements.

### *C. Variety of and Within Contract Law*

Oman’s approach places commerce front and center. Promises and agreements related to markets are to be enforced, unless the market is pathological.<sup>75</sup> Agreements not clearly connected to well-functioning markets are also to be enforced, but apparently only because enforcement might help to develop new well-functioning markets.<sup>76</sup> While I have no objection to an extra focus on markets, and special rules to help to support them, I do have qualms, as already noted, about the express and implied message that promises and agreements unrelated to markets are of no value (beyond their connection to possible future markets) and should not be enforced.

One might wonder whether the single focus, or single fixation, of the Commerce Theory may be partly a product of the distinctive way American Contract Law operates. In many other jurisdictions and contexts, as well as much scholarly commentary, Contract Law is divided up according to the parties involved.<sup>77</sup>

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<sup>73</sup> *Id.* at 103.

<sup>74</sup> See *Hamer*, 27 N.E. at 256.

<sup>75</sup> See generally OMAN, DIGNITY, *supra* note 1. Oman is not the first to this prescription. Cohen describes Roscoe Pound as similarly arguing that “all promises in the course of business should be enforced.” Cohen, *supra* note 3, at 573 (citing ROSCOE POUND, INTRODUCTION TO THE PHILOSOPHY OF LAW 236, 276 (1922)).

<sup>76</sup> OMAN, DIGNITY, *supra* note 1, at 103.

<sup>77</sup> Martijn W. Hesselink, *Towards a Sharp Distinction Between B2B and B2C?: On Consumer, Commercial and General Contract Law After the Consumer Rights Directive* 9–10 (Ctr. for Study of Eur. Contract L., Working Paper Series No. 2009/06, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1416126](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1416126) [<https://perma.cc/8A39-4XN6>].

For European Contract Law, business-to-consumer (B2C) transactions are subject to different rules and principles than business-to-business (B2B) transactions.<sup>78</sup> American law does have some statutory protections for consumers, but these tend to be marginal in their effects, and it is significant that such laws are generally not discussed at length in Contract Law courses (or in the *Restatements of Contract Law*).<sup>79</sup>

The primary law for international sale of goods, the United Nations Convention on Contracts for the International Sale of Goods (CISG, or Vienna Convention), does not apply to B2C transactions at all.<sup>80</sup> By contrast, Article 2 of the American Uniform Commercial Code applies whether the sale of goods is B2B or B2C<sup>81</sup> (though there are some provisions that apply in different ways if one or both parties are merchants).<sup>82</sup>

On the scholarly side, Alan Schwartz and Robert Scott published an influential article suggesting the B2B contracts should be interpreted under different principles than non-B2B contracts (a more textualist approach for B2B). Schwartz and Scott suggest B2B contracts should be treated differently in part because of the different levels of sophistication when both parties are businesspeople, and in part because of the lesser concern for “autonomy” interests when the parties are both businesses.<sup>83</sup>

There are a number of different axes along which one might emphasize the variety within Contract Law: whether by the nature of the parties (B2B, B2C, and where both parties are not business entities), the general nature of the transaction (*e.g.*, the way American law has distinctly different rule systems for sale of goods as against non-sale of goods (services)), the transaction types (*e.g.*, lease, employment contract, insurance, sale of real estate, mortgage,

<sup>78</sup> *Id.*

<sup>79</sup> See generally Stewart Macaulay, *Bambi Meets Godzilla: Reflections on Contracts Scholarship and Teaching vs. State Unfair and Deceptive Trade Practices and Consumer Protection Statutes*, 26 HOUS. L. REV. 575 (1989) (discussing the lack of attention to consumer protection statutes in the contract law literature and the modest effect of such statutes in practice).

<sup>80</sup> Convention on Contracts for the International Sale of Goods (CISG), Apr. 11, 1980, 1489 U.N.T.S. 3 art. 2(a).

<sup>81</sup> U.C.C. § 2-102 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

<sup>82</sup> See, *e.g.*, *id.* § 2-205 (regarding firm offers); § 2-207(b) (relating to battle of the forms).

<sup>83</sup> Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 544–45, 556 (2003).

etc.—all of which have some distinctive rules or principles),<sup>84</sup> and whether the agreement should be understood as “relational” or “short-term”/“one-shot.”<sup>85</sup> Not all legal systems make all of these distinctions, or have rules and principles that vary significantly across each of these dividing lines, but all the legal systems and codes with which I am aware make *many* such distinctions.<sup>86</sup>

One question the variety of types, rules, and principles within Contract Law raises is the tenability or wisdom of universal theories for this area.<sup>87</sup> That is not the topic here. The related theme relevant here is the idea that Contract Law has many facets, a fact that in turn makes it easier, perhaps, to recognize that it serves multiple interests, and different values (which may often overlap, but occasionally conflict).

I do not mean such references as opposition to or rebuttal of Oman’s position. To the contrary, they are meant to be supportive, to be a friendly amendment.<sup>88</sup> Consider an example, what is likely one of the more controversial parts of the book’s argument.<sup>89</sup> Oman offers a provocative response in *The Dignity of Commerce* to the problem of boilerplate terms in standard form and online contracts.<sup>90</sup> Many commentators and some courts have worried about the absence of meaningful consent by consumers and employees to terms in their agreements.<sup>91</sup> While most courts ultimately enforce these provisions, despite concerns about consent,<sup>92</sup> there is a steady stream of courts refusing enforcement.<sup>93</sup>

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<sup>84</sup> See generally KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 121–57 (Little, Brown & Co., 1960) (discussing a variety of transaction types).

<sup>85</sup> Eric A. Posner, *A Theory of Contract Law Under Conditions of Radical Judicial Error*, 94 NW. U.L. REV. 749, 757–58 (2000).

<sup>86</sup> See, e.g., Jan M. Smits, *Law Making in the European Union: On Globalization and Contract Law in Divergent Legal Cultures*, 67 LA. L. REV. 1181, 1182, 1184 (2007).

<sup>87</sup> See Brian H. Bix, *The Promise and Problems of Universal, General Theories of Contract Law*, 30 RATIO JURIS 391 (2017).

<sup>88</sup> OMAN, DIGNITY, *supra* note 1, at 90.

<sup>89</sup> *Id.* at 156.

<sup>90</sup> *Id.*

<sup>91</sup> See, e.g., Margaret Jane Radin, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231 (2006).

<sup>92</sup> See, e.g., *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594 (1991) (enforcing terms from a form contract).

<sup>93</sup> See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless*, 379 F.3d 159 (5th Cir. 2004) (holding a boilerplate arbitration clause to be unconscionable).

Under Oman's analysis, minimal consent (one party providing terms to the second in some form or another, and the second party's having expressed assent in some form) is a sufficient safeguard for most purposes, and the court's being on guard against "pathological markets" should be a sufficient supplement.<sup>94</sup> Expecting or demanding consent in any more robust form is unrealistic, and when the objective of Contract Law is the support of well-functioning markets, a focus on consent is simply misplaced.<sup>95</sup>

The implied cost-benefit calculation regarding the required level of consent is likely correct for transactions between businesses and consumers and between businesses and employees.<sup>96</sup> However, it is less clear that consent need be ignored or discounted in contexts where mass production of forms is less common, as in non-commercial agreements, or even in agreements between sophisticated business parties.<sup>97</sup> This option might be more salient in a less monistic theory, one more attentive to the variety of contexts, uses, and objectives of agreements and promises.<sup>98</sup>

#### *D. Oman and Cohen*

There is a sense in which the approach in Oman's book can be seen as a development of the basic idea of Cohen's article.<sup>99</sup> Oman accepts that Contract Law should serve the best interests of society, and believes that the best way (and the most natural way) for this to happen is by tying the rules of enforcement, performance, and remedies to the service of encouraging well-functioning markets.<sup>100</sup> On the whole, Oman is significantly more skeptical

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<sup>94</sup> OMAN, DIGNITY, *supra* note 1, at 33–59.

<sup>95</sup> *Id.* at 17.

<sup>96</sup> I made a similar argument in Brian H. Bix, *Contracts*, in THE ETHICS OF CONSENT 251, 264–65 (Franklin G. Miller & Alan Wertheimer eds., Oxford, 2010).

<sup>97</sup> Though with business-to-business agreements, the concern may end up being terms that *neither* party understood, because they are standard provisions mindlessly repeated whose original meaning has been lost long before. See Stephen J. Choi, Mitu Gulati, & Robert E. Scott, *The Black Hole Problem in Commercial Boilerplate* 8 (N.Y.U. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 16-40, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2835681](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2835681) [<https://perma.cc/9486-8TA9>].

<sup>98</sup> See, e.g., OMAN, DIGNITY, *supra* note 1, at 35.

<sup>99</sup> OMAN, DIGNITY, *supra* note 1, at 16.

<sup>100</sup> *Id.*

of government regulation than Cohen had been, though he is more open-minded on the topic than the business groups Cohen criticizes in his work.<sup>101</sup> By a focus on supporting well-functioning markets, and avoiding any support of pathological markets, Oman gives clearer normative guidance as to how to clarify some vague standards in Contract Law, and where some rules should probably be changed.<sup>102</sup> As has been discussed, there remain places where one might question Oman's prescriptions, and there are also reasons for preferring a more pluralistic understanding of Contract Law's role.<sup>103</sup> Still, Oman's work can easily be seen as one that takes Cohen's view seriously, and tries to offer a distinct version of what it would mean for Contract Law to serve the common good.<sup>104</sup>

#### CONCLUSION

Nathan Oman rightly comments, early and often in *The Dignity of Commerce*, that it is surprising that his seems to be the first theory of Contract Law that is centered on the market.<sup>105</sup> Yet, if Oman's approach is novel—and the novelty itself is indeed noteworthy, as the book's approach emphasizes what should have been obvious to us long ago—there are still some predecessors to be found in earlier works.<sup>106</sup> This is to be expected; scholarship is rarely *entirely new* (in many areas of philosophy, it is commonly claimed that any allegedly new idea can in fact be found in some form in Plato, Aristotle, or Aquinas).<sup>107</sup> Oman himself notes some predecessors among the American legal realists,<sup>108</sup> and Morris Cohen was of that era, and his work reflects its influence.<sup>109</sup>

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<sup>101</sup> *Id.* at 82, 138; Cohen, *supra* note 3, at 564–65.

<sup>102</sup> OMAN, DIGNITY, *supra* note 1, at 100.

<sup>103</sup> See *supra* text accompanying notes 77–87.

<sup>104</sup> OMAN, DIGNITY, *supra* note 1, at 15.

<sup>105</sup> *Id.* at 8 (“The link between contract law and markets is so palpable ... that the relative absence of markets and commerce as a topic of moral theorizing in contemporary contract law theory is striking.”).

<sup>106</sup> *Id.* at 13–15.

<sup>107</sup> See generally ABRAHAM EDEL, *THE THEORY AND PRACTICE OF PHILOSOPHY* (2017).

<sup>108</sup> See OMAN, DIGNITY, *supra* note 1, at 13–15.

<sup>109</sup> In other published work, Cohen was (like Lon Fuller) a friendly critic of the movement. See, e.g., MORRIS COHEN, *AMERICAN THOUGHT: A CRITICAL SKETCH*



Just as a connection between Contract Law and markets is straightforward, yet perhaps ignored *because* it is so obvious, Morris Cohen's connection in his earlier article between Contract Law and the public interest seems equally obvious, and perhaps ignored in a similar way *because* of its salience.<sup>110</sup> Oman's work brings back Cohen's basic insight, and gives it a more concrete form as a formidable normative theory, with detailed prescriptions.<sup>111</sup> Even if one does not agree with all aspects of the approach, it is clearly an important step forward.

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158–80 (1954); Cohen's son, Felix Cohen, was himself an important legal realist. See generally Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

<sup>110</sup> See OMAN, DIGNITY, *supra* note 1, at 15; Cohen, *supra* note 3, at 562.

<sup>111</sup> See OMAN, DIGNITY, *supra* note 1, at 1.