FOREWORD

FREEDOM *FROM* CONTRACT

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This Symposium explores freedom *from* contract. When I was preparing to travel from my home in Ann Arbor to the University of Wisconsin where this Symposium was to be held, my 9-year-old son asked where I was headed. I explained that a bunch of people and I were going to meet and talk about freedom *from* contract, but the boy seemed unsure what this exchange was going to be about. I tried to translate: "It is about making promises that you don't really have to keep." This sounded surprising to him. He raised an inquisitive brow, and I knew he was wondering: "How come *I* never encountered this species of promises? What are those wonderful promises that you-don't-really-have-to-keep?"

My mind was searching for a way to convey the nuance. "Remember our agreement two weeks ago in which you promised to start helping with dinner preparation by being in charge of setting the table? You made a promise, but I don't recall that you actually have been setting the table every night since. So here you go, a promise that you-don't-really-have-to-keep!" "We never said that I had to do it *every* night," the 9-year-old protested. "But we also never said that you don't have to do it at all," I responded. "Sometimes people are serious but other times they unsure about their intent, and it may be hard to know exactly what they mean and whether they truly intend to keep the promise."

At that moment, I recognized that I was describing to my son only one dimension of the freedom *from* contract problem, the dimension that involves freedom from preliminary agreements, or, more generally, from incomplete contracts—from bargains that were sketched out but never fully concluded. When the promise is only roughly outlined, is it binding? Should it be binding when the parties reached some, perhaps substantial, understanding and agreed to continue to "negotiate" the remaining details? These issues are explored from various directions by several of the articles in this Symposium.

My son, I imagined at that moment, was possibly thinking to himself something along the following lines: "little does Dad know that I never intended in the first place to help with setting the table, definitely not with any regularity . . . ." This narrative, too, I realized, is a

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freedom-from-promise subtext, often referred to as "promissory fraud": the making of a promise with the intent not to keep it. What should be the legal consequences of a promise that was made under such circumstances? Does it matter if the fraudulent promise was subsequently breached? This issue is the focus of another article in this Symposium.

But sneaky motives are not merely the prerogative of an opportunistic 9-year-old. While he made his promise envisioning one pragmatic scenario (that of nonperformance), I recalled during my conversation with him what I was thinking to myself two weeks earlier, at the time the original bargain was enacted: "little does my son know that the actual regularity of his obligation will eventually be *dictated* by his parents, over the course of the following weeks." In other words, my own subtext was: let him take the bait; the real terms of the promise are "wrapped," to be revealed after the deal was struck. It is the parent—the drafter-in-control—who will determine those details. Several of the contributions to this Symposium will explore this major contemporary problem: the freedom that promisors have (and often don't have) from such "terms in the box"—shrinkwrapped terms that are revealed post-assent.

When I conveyed this exchange to my wife, it turned out that her understanding of our son's promise was yet different than either his or mine. "Of course the promise he made is not binding," she enlightened me. "The whole purpose of the agreement was to induce the boy to *voluntarily* contribute to the family effort. If we were to enforce it, or to dictate the fine terms, this would undermine his own self-imposed motivation and responsibility." Freedom *from* contract, in other words, especially the immunity from formal sanctions, can breed other more informal norms of behavior, emerging from individuals' sense of fairness, dignity, and trust. This theme is developed and applied in another important contribution to this Symposium.

Eventually, I made it to Madison, Wisconsin, and spent three days with a group of contracts scholars and law review editors, exploring these and related ideas. This Symposium issue of the *Wisconsin Law Review* brings together various new thoughts and perspectives on when and why liability might arise in the absence of affirmative assent. It provides doctrinal and conceptual explorations, as well economic, political, and philosophical inquiries into the problem of drawing the optimal boundary of freedom *from* contractual obligation.

In the remaining parts of this Foreword, I will briefly sketch the scope of the conference and provide a few references to the state-of-knowledge prior to this conference.

What is Freedom from Contract?

This Symposium revisits the "second" contractual freedom, the freedom *from* contractual liability. A contract that forms upon mutual assent—upon the bilateral manifestation of consensus over its terms—accords each party an opportunity to exercise the "first" contractual freedom, the freedom *of* contract, that is, the freedom to design the terms of trade. This is the power to create obligations that promote one's interests, the power to harness others people's efforts to the pursuit of one's affairs. But since there are two parties and thus two competing sets of affairs that need to be aligned, the process of bargaining over an agreement and negotiating its provisions is often complex. Having entered into this negotiation process, or even accepted some partial performance, how free are the parties to withdraw? How free are they *from* contractual liability? Can the parties make representations that are not legally enforceable? Are they free from obligations that were not expressly negotiated? Should the law accommodate "regret"?

Like the primary contractual obligations, the parties can potentially stipulate the answers to these issues; determine their own precontractual duties; and the legal consequences of various negotiation and contracting strategies. But in the absence of privately designated protocols, it is up to the law to determine the freedom to withdraw from contractual obligations.

And the law, indeed, has been active in regulating these questions. It was once thought that prior to the manifestation of express mutual assent—prior to the narrowing down of the deal to a definitive set of terms—parties are free to walk away, wholly unburdened by any contractual or residual liability. The contract versus no-contract boundary was the threshold between full expectation liability and zero liability and was crossed only when both parties made explicit objective statements of commitment that manifested consensus.[1] In particular, provisions not assented to affirmatively were not part of the contract; agreements now to agree later created no liability; silence and nonrejection could not be construed as acceptance. But this view has been reformed in many ways. As Professor Charles Knapp and others have recognized in the past, the law imposes on negotiating parties a variety of obligations that have limited the freedom to abandon negotiations and the freedom *from* contract.[2] Explicit assent is not

1. *See, e.g.*, E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealings and Failed Negotiations*, 87 COLUM. L. REV. 217, 221 (1987).

2. Nili Cohen, *Pre-Contractual Duties: Two Freedoms and the Contract to Negotiate*, in GOOD FAITH AND FAULT IN CONTRACT LAW 25 (J. Beatson & D.

required for the majority of contractual provisions, which can be supplemented by statutory gap fillers.[3] And the law is much more lenient in enforcing terms drafted be one party, accepted by the other's passive conduct of nonrejection.[4]

Some of these limitations on freedom from obligation may be self-imposed. For example, an offeror may restrict his power to revoke an otherwise revocable offer.[5] This, too, was once thought to be a "legal impossibility," as such a commitment to the negotiation process—such waiver of the freedom from contract—was perceived to be one-sided and lacking consideration.[6] Or a party may promise, at the outset of the negotiations, to pay a lock-up or a breakup fee in the event that he decides not to enter into an agreement. Similarly, parties may limit their freedom from contract by adopting negotiation practices that do not require affirmative acceptance, but instead deem offers to be accepted unless expressly rejected (that is, accepted by silence). But these intentional restrictions on the freedom to walk do not represent a diminished freedom from contract any more than say, an agreement to sell one's property diminishes one's property rights. On the contrary, the fact that parties can trade away their freedom from contract via an intentional private precontractual arrangement suggests that this freedom would otherwise be substantial and unrestricted.

More interestingly, restrictions on the freedom of negotiations and from terms not explicitly assented to are increasingly imposed by the law as a matter of default arrangement, and often even in an immutable manner. Most notable, perhaps, is the active role that contract law assumes in filling gaps in the agreement. Agreements that lack basic terms, such as price, duration and terms of payment, can now be enforced with the aid of gap fillers.[7] Without such statutory gap fillers, explicit agreement would have been required for the parties to be bound. But with the diminishing requirement for explicit consent, parties may find themselves liable before they actually agreed on many of the contract's provisions, some of which they may have hoped to further negotiate in the course of their relationship. The freedom that they once had, to walk away any time before they consented to all the basic terms, has eroded with the rise of majoritarian gap fillers.

Friedman, eds., 1995); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673 (1969); Richard E. Speidel, *The New Spirit of Contract*, 2 J.L. & COMM. 193 (1982).

3. U.C.C. § 2-305 (2003).

4. *See, e.g.*, ProCD v. Zeidenberg, 86 F.3d 1447 (7th Cir. 1996).

5. U.C.C. § 2-205.

6. *See, e.g.*, Dickinson v. Dodds, 2 Ch. D. 463 (1876); *see also* C.C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 178 (1880).

7. RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981); U.C.C. § 2-204(3).

In the gap-filling case, freedom from contract is weakened because parties may find themselves under obligation that they never affirmatively assumed. A similar problem, and another restriction on freedom from contract, arises when parties find themselves bound to terms that were expressly drafted, but were either hidden in the shrink-wrapped box or determined at a later stage ("rolling contract"). Determining whether a consumer is bound to these "passively" assented-to terms is an important way in which the law regulates the freedom from contractual obligation. It is, indeed, a hot topic in contemporary contracting, the subject of polar division among courts,[8] and one that is only vaguely addressed under the proposed amendment to Article 2.[9]

Shifting attention to the law of negotiations, the obligation to negotiate a contract in good faith is another component in the restrictions on the freedom from contract. Whether or not such an obligation exists at the start of the negotiations, it is quite clear that it has substantial weight at the advanced stages of the negotiations. And it may also be imposed on parties to relational contracts, once their ability to voluntarily communicate and "regenerate" their obligations is compromised.[10] In a typical case, parties who reach partial understanding over terms and agree to continue negotiate the remaining issues are obligated to carry out the further negotiations in good faith.[11] This means that the power to make and reject proposals is no longer unconstrained. While parties cannot be forced to complete the negotiations, and while bad faith does not ordinarily give rise to contractual remedies, it does involve a cost—often reliance damages[12]—that are aimed to channel the otherwise reluctant party into a contract.

Some restrictions on the freedom to withdraw from negotiations are one-sided. There are restrictions that are applicable to offerors only, by, say, limiting the revocability of certain offers. The most prominent case in which such an irrevocability presumption applies is a bid by a

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8. *Compare* Hill v. Gateway 2000, 105 F.3d 1147 (7th Cir. 1997) (holding that terms in the box are binding if the buyer had an opportunity to return the goods after reading the terms), *with* Klocek v. Gateway, 104 F. Supp. 2d 1332 (D. Kan. 2000) (holding that same terms, if material, are not binding unless expressly accepted by the buyer).

9. Under amended Section 2-207(b) of the Uniform Commercial Code, terms drafted by the seller and hidden in the box are binding to the extent that "both parties agree"—a standard vague enough to permit the array of holdings under the current Article 2.

10. Oglebay Norton Co. v. Armco, Inc., 556 N.E.2d 515 (Oh. 1990) (requiring CEOs of two companies who had a long-term relationship to negotiate and mediate to fill in the gaps in their agreement.)

11. *See, e.g.*, Teachers Ins. & Annuity Ass'n of Am. v. Tribune Co., 670 F. Supp.491 (S.D.N.Y. 1987); Copeland v. Baskin Robbins U.S.A., 117 Cal. Rptr. 2d 875 (Ct. App. 2002).

12. Hoffman v. Red Owl Stores, 26 Wis.2d 683, 133 N.W.2d 267 (1965).

subcontractor that is relied upon and included in the general contractor's bid.[13] Such one-sided limitations on the freedom from contract were perceived in past generations to conflict with the fundamental requirement of *mutuality*, or consensus—the notion that unless both parties are bound, neither is bound. But various developments, including reform in the doctrine of unilateral contracts and the decline of the illusory promise concept, have made it increasingly possible to structure obligations with one sided options, that is, with one-sided restrictions on withdrawal.[14]

These doctrines and many others[15] regulate the procedures that parties may follow during negotiations and their precontractual liability. But rules governing contract interpretation can also affect the freedom to negotiate. By assigning legal consequences to representations made during the negotiations, these rules indirectly restrict the behavior of the parties and might hold them bound to obligations they did not intend to create. For example, the traditional rigid parol evidence rule barred courts from relying on oral representations made between the parties, so long as they did not amount to fraud. But under more recent and more lenient approaches, courts can rely on precontractual expressions to interpret, and often to vary and even trump the explicit terms.[16] However advantageous this interpretive approach might be from an *ex post* perspective, it makes it costlier for a negotiating party to communicate information.[17] The freedom to employ bargaining strategies while avoiding liability is diminished.

There are, to be sure, various other important legal doctrines that restrict parties' ability to shed-off contractual liability. This Symposium will provide a rich description of many additional examples. In the remaining space, I want to introduce some of the common concerns that inform the debate over the desirable boundaries of freedom *from* contract.

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13. *See, e.g.*, Drennan v. Star Paving, 333 P.2d 755 (Cal. 1958).

14. *See generally*, Avery W. Katz, *The Efficient Design of Option Contracts: Principles and Applications* (Columbia Sch. of Law, Ctr. for Law and Econ. Studies, Working Paper No. 248, 2004), *available at* http://papers.ssrn.com/paper.taf?abstract_id=512146.

15. For a comprehensive study of the different grounds of liability prior to a contract, see Farnsworth, *supra* note 1.

16. U.C.C. § 2-202; Hunt Foods & Indus., Inc. v. Doliner, 270 N.Y.S.2d 937 (App. Div. 1996).

17. I am grateful to Professor Lisa Bernstein for mentioning this effect of the parol evidence rule.

Some Traditional Justifications for Freedom from Contract

The rise of precontractual liability has eroded the traditional precontractual regime of unrestricted freedom from contract. These developments in the law, while aiming to provide better precontractual discipline and secure the "integrity" of the negotiation arena, can be seen as a threat to other social concerns.

First, and perhaps foremost, liability prior to a contract reduces the power of a party to self-regulate its obligations. If obligations arise before both parties fully consented to them, the voluntary nature of these obligations is diminished. The notion that contract is a vehicle for private, autonomous ordering is founded on principle that contractual obligations are willed by the parties, and that—in the absence of such will—no promissory obligations arise. As Charles Fried explains, "the will theory, which sees contractual obligations as essentially self-imposed, is a fair implication of liberal individualism."[18] If an individual's choice to refrain from a contract is constrained, that is, if an obligation arises to promote a social, rather than a private concern, the autonomy of this individual is diminished.

Will theory can remind us what is at stake. It is not, however, particularly useful in drawing the precise boundaries of the freedom from contract. Surely, a liberal conception of individual autonomy can withstand *some* tailored restrictions on this freedom, if they are necessary to promote some other social good, including the autonomy of a relying counterpart. So long as individuals are not bound to enter into negotiations and are not submitted to arbitrary transfers, the self-imposed nature of contractual and precontractual obligations remains by and large secure. It is not the institution of private ordering that is threatened by tailored restrictions on the freedom from contract, nor private autonomy, but rather the more particular functions of the market.

How is trade affected by legal regulation of the negotiation process? Restricting the parties' freedom from contract diminishes the opportunity of an individual to *freely* walk away from negotiations. This added cost could potentially chill the incentives of the parties to enter the negotiations in the first place.[19] Relative to a world in which, at any time prior to mutual assent, parties are free to exit the negotiations, the increase in precontractual liability consequences would caution parties to think twice before launching into negotiations or before entering into

18. CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 2 (1981).

19. *See* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 361 (2d ed. 1998) (discussing precontractual liability having "a chilling effect" of discouraging parties from entering negotiations).

contemporaneous bilateral negotiations with multiple parties, and thus reduce the frequency and the ease of negotiations. This, in turn, is undesirable because some opportunities for mutually beneficial trade can be squandered.

Another way to view the chilling effect of liability is to recognize that when the law steps in and establishes legally enforceable obligations on the negotiating parties, other sources of obligations might be crowded out. If, by law, the freedom of a party to reject a contract is restricted, there is less to be determined by voluntary assent. Accordingly, trust-based mechanisms for the creation of obligations would be substituted by legal sanctions. The propensity to rely on informal and cooperative resolutions would naturally diminish.

The chilling effect highlights an *ex ante* distortion. It suggests that parties who anticipate the "trap" of reduced freedom *from* contract liability would exert greater caution in deciding to enter negotiations. But the reduced freedom from contract can also have a distortive effect *ex post*, after the parties already entered negotiations. At this stage, even a party who entered the negotiations with a sincere desire to transact may eventually prefer to refrain from transaction. Perhaps he discovered that other opportunities are more worthy; or that this transaction involves costs that were not previously anticipated; or he may simply acquire distaste towards the counterpart. When the freedom from contract is constrained, the flexibility that would otherwise exist to "skip" partners would diminish. As a result, parties may be stuck with unwanted transactions. The ability to enter better, more efficient, deals would decline.

Finally, a regime of freedom from contract is advantageous because it provides a simple and certain landmark for the initiation of liability. Liability arises only when the parties formally manifest mutual assent, and not beforehand. This provides the negotiating parties with added certainty, as they can better identify the moment in which they become liable. Freedom *from* contract, implying the absence of precontractual liability, is an aspect of the basic all-or-nothing feature of contractual liability: there is full liability once consensus is manifested, but there is no liability otherwise. If liability—however measured—can arise prior to mutual assent, the boundaries are less clear and the parties might need more legal advice to recognize the legal consequences of their negotiating tactics.

Why Might It Be Desirable to Limit the Freedom from Contract?

The answers to this question are, of course, the topic of this symposium, and thus it would be presumptuous on my part to summarize in the remaining page of the Forward the many

considerations on which such answers rely. Still, it might be useful to sketch the starting point for this symposium—the interests that may be advanced by tailored restriction on the freedom from contract.

Often, parties waive the banner of freedom from contract deviously, to masquerade what is otherwise plain opportunistic regret. Something changed—prices went up, new bidders came by, the deal doesn't look so good after all—such that a retracting party may seek to recapture an opportunity he gave up previously, when making a promise. Thus, for example, a party who made a firm offer in the hope of attracting attention from the offeree may seek to revoke it when a better deal was proposed by a third party.[20] Here, limiting the *ex post* freedom *from* contract is the obvious flip side of respecting parties' *ex ante* freedom *to* contract: it is only their own self-imposed obligations, to which the parties wanted to be bound, that are binding.

Other concerns may also be prominent in limiting the freedom from contract, even when opportunism is not present. Protection of the reliance interest is, of course, one such principle concern, which has served as the foundation for a variety of freedom-restricting doctrines. For example, Section 87(2) of the *Restatement (Second) of Contracts* talks about offers which, by virtue of being relied upon, can be binding "to the extent necessary to avoid injustice." Or, in franchise and distributorship agreements, the power of the franchisor to terminate the agreement (or to refuse renewal) can be limited to the extent that the franchisee or distributor has made specific reliance investments that, but for renewal, would be forfeited.[21] Here, a relational contract that would otherwise be terminable at-will cannot be dissolved prior to recovery of the specific investments. More generally, the freedom of contracting parties to cancel deals and terminate on-going relationships—however broad it might be in law and in practice—is often restricted by liability for forfeited reliance costs.[22]

Limiting the freedom *from* contract, in the form of aggressive gap filling in indefinite contracts, can be the upshot of specific policies aimed at instilling particular terms and practices into a class of relationships. Thus, for example, agreements with open quantity terms, which were deemed in the past to lack mutuality,[23] now exhibit less freedom from contract, once it was understood that some types of

20. *See, e.g.*, Petterson v. Pattberg, 161 N.E. 428 (N.Y. 1928)

21. *See, e.g.*, Bak-A-Lum Corp. of Am. v. ALCOA Bldg. Prods., Inc., 351 A.2d 349 (N.J. 1976) (holding that even a distributorship arrangement cannot be terminated if that would destroy the franchisee's ability to recoup investments).

22. Stewart Macaulay, *The Standardized Contracts of United States Automobile Manufacturers*, 3-21 INT'L ENCYCLOPEDIA COMP. L. 18 (1974).

23. *E.g.*, Wickham & Burton Coal Co. v. Farmers' Lumber Co., 179 N.W. 417 (Iowa 1920) (a requirements contract not enforceable because it did not bind the buyer to buy a minimum quantity).

transactions require a flexible quantity arrangement. Different types of transactions in different industries, or between parties of varying sophistication, might therefore require different magnitudes and content of supplementation, namely, a quicker entry into the domain of contractual liability. And similarly with respect to exit from contractual obligation: what events constitute impossibility or impracticability (and free the obligor from liability) could well depend on the type of transaction and the industry norms.[24]

Finally, limiting the freedom *from* contract means that agreements and promises may be enforceable even if pronounced in less than complete and formal manner, as in the absence of affirmative manifestation of acceptance. There could be good reasons to enable parties to be bound even when their affirmation of intent is passive or incomplete, mostly having to do with saving of transactions and contracting costs.[25] Surely, there are counter-concerns with the content of passively or irrationally accepted terms. Indeed, regulation of specific markets, particularly credit markets, often provides enhanced protection of consumers' freedom from contract by, say, regulating an immutable right to cancel the contract within a specified period.[26] It is sometimes questionable whether freedom from such passive contracts would solve the problem of coercive terms, or rather have the sole effect of forcing the parties to waste more resources on explicit contract formation. These issues will be explored by several of the contributors to this Symposium.

Returning, then, to the basic query, can parties, at the course of negotiations, make promises to which they do not intend to be bound? The answer is: not without cost. These costs, however, represent a synthesis of various conflicting interests and concerns, which we shall now turn to study in more detail.

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24. Indeed, the landmark case of *Taylor v. Caldwell*, 122 Eng. Rep. 309 (1863), distinguishes between personal service promises and services for which there are identical substitutes

25. *See, e.g.*, James J. White, *Autistic Contracts*, 45 WAYNE L. REV. 1693 (2000).

26. *See, e.g.*, 16 C.F.R. § 429.1 (2003) (requiring door-to-door sellers to provide the buyer a cancellation form entitling her to cancel the transaction within three days).