ESSAYS

Anti Anti-Paternalism

JOSEPH WILLIAM SINGER·

[T]he court's rhetoric of freedom of choice . . . is simply another way of exercising power.[1]

~ Mary Joe Frug

We here highly resolve . . . that government of the people, by the people, and for the people, shall not perish from the earth.[2]

~ Abraham Lincoln

EVERYONE HATES PATERNALISM. (Or almost everyone.)[3] We like to think we are the best judge of our own interests even if we are muddle-headed and stubborn.[4] It is our lives, after all, and we have the right to make our

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[1] Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1134 (1985) [hereinafter Frug, *Re-Reading Contracts*].

[2] Abraham Lincoln, Gettysburg Address (Nov. 19, 1863), ABRAHAM LINCOLN ONLINE, http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm.

[3] *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 5 (2008); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 563 (1982); Cass R. Sunstein, *Choosing Not to Choose*, 64 DUKE L.J. 1, 1 (2014); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1138 (1986).

[4] *See* Alan Schwartz, *Justice and the Law of Contracts: A Case for the Traditional Approach*, 9 HARV. J. L. & PUB. POL'Y 107, 107 (1986) ("[P]eople are the best judges of what maximizes their own utility; hence, allowing them to make unrestrained choices is most likely to maximize utility for the individual and for society as a whole.").

own choices, sensible or not.[5] A free society, one might think, gets out of the way and liberates each of us to pursue our path, to live our dreams, to choose our associations, to make our own plans, to make up our own minds. Others may think they know what is good for us, and sometimes they are right. But it is another thing entirely for them to impose their will on us and prevent us from making our own choices and our own mistakes.

This enthusiastic defense of individual liberty expresses deeply-felt American values and is a basic characteristic of United States political culture. There is a lot of truth to this anti-paternalist view. Indeed, the Declaration of Independence expresses this exact thought. "We hold these truths to be self-evident; that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness."[6] The American way of life is based on the idea that individuals get to choose their own path in life. We choose where to live, what work to engage in, what religion to live by or to reject, whom to marry and befriend, how to have fun, what values to live by, and how to make our lives meaningful to ourselves and others. Laws that stop us from doing these things bear a heavy burden of justification.

All this is correct. But—and this is a big "but"—our love of freedom does not justify a skeptical stance toward all government regulation. It is important to understand why this is so. We are living in an age that reflexively views government as oppressive rather than helpful, and regulation as a limitation of freedom rather than the legal infrastructure of a free and democratic society. This set of attitudes stacks the deck against law reform efforts that might respond to our current predicament of increasing inequality of wealth and income, as well as the continuing economic disparities between women and men. We are in the midst of a presidential campaign as I write these words, and although everyone acknowledges the problem of inequality, few are proposing public policies that would actually do something significant about it.[7] Part of the reason for our paralysis on this issue is the distorted idea that government regulation restricts our freedom and does more harm than good.

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[5] *See* JOHN STUART MILL, ON LIBERTY 63 (Gertrude Himmelfarb ed., Penguin Books 1977) (1859) ("There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism.").

[6] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[7] The candidate who has come the closest is Bernie Sanders, although as the campaign progressed, he induced Hillary Clinton to think more deeply about the issue and to begin to address it in some detail. *See also* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 241–309 (2015) (proposing actual policy changes to address income inequality).

I. Anti Anti-Paternalism

Viewing regulation as presumptively "paternalistic" and destructive of "freedom" prevents us from understanding the role of government and law in creating the conditions of freedom. What resources are at our disposal to better understand the relationship between law and freedom? A fierce advocate of freedom might direct our attention not only to our right to pursue happiness but to the fact that the Declaration of Independence extends this right to "all men."[8] That term may or may not have extended to women at the time it was written; it may or may not have extended to human beings who were not "white." Liberty is important, but so is equality. What laws are needed to achieve both, and what form does each take? A fierce advocate of both freedom and equality might also remind us that the famous paeon to liberty in the Declaration of Independence is followed by the observation that "to secure these rights, Governments are instituted among Men."[9] What role does government play in ensuring the equal opportunity to pursue happiness?

In answering these questions we face a conflict between typically libertarian responses and typically liberal ones. A libertarian might reply that government should prevent force and fraud, protect property rights, and do nothing beyond that. Protecting our autonomy requires a small government that leaves us free to act as we please as long as we do not harm others. Equality comes from ensuring equal liberty to pursue happiness, not from laws designed to promote equal outcomes.

The problem with this libertarian approach is that, even if we adopt it, we need a vigorous government and a robust regulatory structure. It turns out that neither free markets nor private property can exist without a legal infrastructure that entails normative choices about social relationships. A lot more law is needed to do these things than we commonly recognize.[10] And despite the fact that "equality of opportunity" is generally thought to be a libertarian mantra, it would actually require radical law reform and policy action to make it a reality.[11] If we really believed in "equal" opportunity, we would reject the libertarian small-government philosophy since it is bound to deny individuals equal opportunity to pursue happiness. We need to think deeply about the meaning of liberty and equality and how they are—and are not—promoted by "Governments . . . instituted among Men."[12] We might start by discerning what a fierce

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8 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

9 For an extended meditation on this phrase, see DANIELLE ALLEN, OUR DECLARATION: A READING OF THE DECLARATION OF INDEPENDENCE IN DEFENSE OF EQUALITY (2015).

10 JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 177 (2015).

11 BRIAN BARRY, WHY SOCIAL JUSTICE MATTERS 37–39 (2005) (making this argument).

12 *Contra* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

advocate of liberty and equality would have to say about these issues. On that score, I can think of no better way to do this than to ask: What would Mary Joe Frug say?

Here are three things she might ask us to think about. First, she would note the gendered nature of the discussion.[13] Why "paternalism"? Why not "maternalism"? What is it about the concept of the "father" that makes paternalism the term that we use? Why "governments . . . among men"?[14] Does that include women? Does that include African American men? Does it include Latina or Native American women? Does it include the daughters of undocumented women?[15] Something important is hidden in the gender of paternalism that we need to understand.

Second, Frug would likely ask us to unpack the context within which freedom is exercised.[16] That context includes social relationships, the existing distribution of property, the prevalence and expression of discriminatory attitudes in the workplace, and the gendered division of labor in the home and at work. What do we mean by "choice"? By "freedom"? And when is one person's exercise of freedom another person's exercise of power?

"Paternalism" suggests we face a conflict between deferring to individual choices and overriding them. But if choices are always framed by the social and legal context, this conception of a tension or contradiction between regulation and freedom disappears. The question is not whether to defer to individual choices, or to override them, but how law does—and should—shape the contexts within which free choices are made? We need not believe that government officials know what is good for us better than we do to believe that regulations serve a variety of goals that enhance, rather than detract from, our liberty. Rather than arguing for paternalism, we need a way to escape from the paradigm that identifies regulation with oppression. We need, in short, a perspective that is anti anti-paternalist.

Third, Frug would criticize the idea that individuals act alone. We do make individual choices in our own lives, but we also act collectively with others to make choices about the environment within which we live. The anti-paternalist argument misses the role of democracy in social and political life and in shaping the conditions of our freedom. The Declaration

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13 *See* Mary Joe Frug, *A Postmodern Feminist Manifesto*, 105 HARV. L. REV. 1045 (1992) [hereinafter Frug, *A Postmodern Feminist Manifesto*].

14 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

15 *See* ELIZABETH V. SPELMAN, INESSENTIAL WOMAN (1990) (discussing the slippery nature of concepts of personhood and the ways terms hide core exemplars from peripheral cases).

16 Mary Joe Frug, *Rescuing Impossibility Doctrine: A Postmodern Feminist Analysis of Contract Law*, 140 U. PA. L. REV. 1029, 1042 (1992) [hereinafter Frug, *Rescuing Impossibility Doctrine*]; Frug, *Re-Reading Contracts*, *supra* note 1, at 1108; Mary Joe Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55, 103 (1979) [hereinafter Frug, *Securing Job Equality for Women*].

of Independence champions the "pursuit of Happiness"[17] but the Constitution extolled the idea that "We the People" sought to create a government for the purpose of "establish[ing] Justice, insur[ing] domestic Tranquility, provid[ing] for the common defence, promot[ing] the general Welfare," as well as "secur[ing] the Blessings of Liberty. . . ."[18] And, according to Abraham Lincoln, we fought the Civil War to ensure that "government of the people, by the people, and for the people, shall not perish from the earth."[19]

Democracy means many things. One of them is the ability of the people to choose representatives who pass laws to govern social interaction. A strict anti-paternalist stance would suggest that we should abolish the Congress and the state legislatures and appoint philosopher kings who would tell us what laws are appropriate. Libertarians who want limited government have no real role for legislatures. If we want rules that promote the maximum liberty for each, compatible with the maximum liberty for all, we should call on the experts to work this out. The problem is that Americans have rejected monarchy or aristocracy as a form of government. Understanding the role that democracy plays in both securing and shaping the contours of liberty, security, equality, and social welfare requires a way of thinking that cannot be encompassed by the critique of paternalism.

Statutes are a central aspect of a democratic government. But statutes are marginalized or ignored when paternalism is conceptualized as regulation that limits choice. "Paternalism" distorts the role of statutes in modern life. One way to see this is to look at the contracts casebooks that Mary Joe Frug analyzed to see how they treat laws enacted by the people's representatives. Those statutes form crucial roles in modern life by setting minimum standards for contractual relationships. But our educational system treats them, not as the foundation for liberty, equality, and justice, but as oppressive yokes limiting our freedom. Mary Joe Frug would ask us to reimagine the role of law in shaping the conditions of our lives and to rethink our preoccupation with paternalism. We need no longer indulge our fear of being treated like children. And we can escape that fear by better understanding the ways in which government by the people can promote life, liberty, and the pursuit of happiness for all human beings.

II. The Gender of Paternalism

Why "paternalism"? Why not "maternalism"? Or better yet, something gender-neutral like "dictatorship"? What is being conveyed by the paternalism moniker is control—the idea that decisions are being made by

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17 THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

18 U.S. CONST. pmbl.

19 Lincoln, *supra* note 2.

someone else. If that is the core notion, then a gender-neutral term would do as well. Perhaps the term came into use at a time when "men" meant "human beings." Perhaps it was not intended to evoke different roles of men and women at all. But still, by our modern lights, the term is gendered and we might learn something from that. Mary Joe Frug at least would not ignore the gendered content of the concept.

Perhaps the paternalism concept is a holdover from the time when both law and social convention not only subjected children to the custody of their parents, but made the father the one who ruled over the family. The "man of the house" controlled not just the children but his wife. A maternal figure might not convey the kind of control that a paternal figure evokes, at least if we imagine the man to be the head of the household. Perhaps motherhood conveys love and caring rather than rule-making and discipline. Paternalism suggests a strong ruler who substitutes his will for yours while maternalism might suggest someone who is supportive rather than disciplinary. But of course, the opposite might be the case. Mothers might be thought to be even more controlling than fathers. Perhaps fathers seek to make their children strong and independent while mothers seek to keep them close to home and safe. Perhaps maternalism would be an even more pernicious form of limiting the choices of children than paternalism would be.

The concepts of paternalism and maternalism get their meaning from the social and historical context in which fathering and mothering occur. The family has changed over time as have the relations between parents and children. At the same time, it is not an accident that the gendered concept of paternalism is the one we use. What are we to make of that?

The most obvious answer is that we are trying to distinguish between paternal control of the family and political control of the people. Medieval political theory saw the relation between the father and the family as a model for the relations of God to the King and the King to the people. The father unites all forms of power; as lord and master, he controls both property and people in his domain. Paternalism then might suggest control by another that not only treats one like a child but subjects one to unregulated power by a lord. Rejecting paternalism therefore means treating people like adults who are free to make their own decisions. It also means rejecting "lordship" as a form of both government and property. Rather than a "lord" that rules his land, a democracy separates sovereignty from property, at least to some extent; rulers are separate from owners. Rulers set the rules of property ownership and then step out of the way, enabling owners to pursue happiness. A free, democratic society rejects the unity of sovereignty and property characteristic of feudal or slave societies. Individuals are free to act within limits set by government; they are not servants to masters or tenants to feudal lords.

Paternalism as a concern suggests that our core fear is loss of control.

What we seek is separation from the father; our goal is independence. A good father, we might think, seeks to prepare the child for independence by teaching the child how to be on his or her own. Mothers, in contrast, are likely to seek connection; they want to support their children and to love them. Maternalism evokes care and enveloping warmth. From the anti-paternalist stance, maternalism might seem to be as stifling as paternal control. Still, the notion of support, care, and love suggests another line of inquiry. Is it true that we seek freedom from both the father and the mother? Do we want independence without support or love? Or do we want the mother's love to continue while breaking free of the father?

If we step back from traditional gender roles and imagine what parents might want for their children, we can see that they want to express love for their children, not just discipline and control. At the same time, they do want to instill certain values in their children, as well as certain capabilities. They seek to enable their children to thrive and that does not mean pushing them out of the nest when they reach eighteen. Parents do not end their role when children become legal adults; they continue to provide support, advice, care, and, yes, love. If paternalism includes love, then independence is only part of the goal.

Nor does love extend only to one's kin. After all, underlying our legal and governmental structure are moral norms that move us to think beyond ourselves. Love your neighbor as yourself.[20] If independence means indifference to others, then our basic normative framework disappears. If the right to pursue happiness extends to "each man," and if that includes everyone, then our laws must enable each person the social and economic support necessary to flourish. Parents do want children to learn to live their own lives, but they do not long to throw their children away. They love them, and if paternalism includes love, then our goal is not just freedom from control but the interpersonal and material support that enables individuals to seek meaning, connections with others, and a comfortable life. And if we want our children to live in a world where they can flourish, we can only achieve that by making sure that other parents' children can flourish as well. We want to leave the next generation a better world, or at least one that is not worse than ours. We want to broaden possibilities for our children while banning structures and conduct that subject them to cruelty, suffering, or indignity.

Our legal and political system could use more of this type of paternalism. We can move from the gendered concept to a more gender-neutral norm of parental care. It is becoming harder for children of poorer families to do well in the world. Class divisions are hardening. What changes are needed to make it possible for all children—*all children*—to flourish? When our daughter was born, my wife said something that

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[20] *Leviticus* 19:18.

startled me. She began to look at her students differently. Each one of them, she said, was someone's baby. If we looked at each person that way, we might show more concern and respect for individuals; we might think more deeply about what policies and laws are needed to make it actually possible for each and every person to pursue happiness. Assuming that government should just "get out of the way" would not solve that problem. That is because choices are constrained by their contexts, and it is crucial to understand why this is so.

III. The Contexts of Choice

In her incredible article, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, Mary Joe Frug argued, among other things, that a choice is not a free one if circumstances constrain one's choices.[21] She describes the law governing form contracts and the general rule that makes them enforceable regardless of their terms or the circumstances under which they are signed. The traditional view is illustrated by the case of *Allied Van Lines, Inc. v. Bratton*.[22] That case enforced a standardized agreement that limited a carrier's liability for loss or damage to goods in transit while refusing to enforce the agreement as to one customer to whom a false oral statement had been made.

The case itself suggests that circumstances matter. Mrs. McKnab was relieved of the contractual obligation because oral statements were made that contradicted the written terms.[23] Mrs. Bratton, on the other hand, was bound by her own promise, whether or not she understood what she was promising when she signed the contract, and whether or not those terms were fair or consistent with her justified expectations.[24] The case illustrates the idea that one has a duty to read one's contracts and to refuse to sign if one is not willing to agree. The contract in *Allied*, in fact, gave the consumer the opportunity to pay for more insurance if she wanted it. The standard view suggests that fraud may vitiate the agreement, but that it does not matter whether one actually has an alternative to signing the agreement. The assumption is that "the market" would provide an alternative if consumers actually wanted one, so the inability to bargain for new terms with a large company does not impinge on contractual freedom.

Frug argued that it mattered that the cases in the casebook that "regulated" contract terms were likely to involve women as parties, suggesting that women were more in need of protection than men, or

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21 *See* Frug, *Re-Reading Contracts*, *supra* note 1, at 1125–34 (discussing the contexts within which people sign form contracts).

22 *See* Allied Van Lines, Inc. v. Bratton, 351 So. 2d 344, 345 (Fla. 1977).

23 *Id*. at 347–48.

24 *Id.* at 348.

perhaps that men who seek protection from standard form contracts are acting like women rather than independent persons.[25] They seek "paternal" interference or protection rather than standing on their own two feet. But, as Frug explains, the circumstances of contracting matter. Frug explains:

> [F]ootnotes to the opinion reveal that Mrs. Bratton testified at trial that she did not read the document because "the house was really cold; and the men were tired. They were in a hurry to get out." Although some people might feel free in such a situation to ignore the workers' discomfort in order to pause to carefully study the moving company's documents, it is not surprising that Mrs. Bratton could not. Women are socialized to consider and value others' feelings above their own, and Mrs. Bratton simply acted like a woman in this situation. Because feminist readers are sympathetic to characteristics commonly associated with women, the court's refusal to evaluate the substantive content of Mrs. Bratton's standardized contract will not seem like a neutral judgment to these readers but a preference for male rather than female personality traits. Rather than feeling critical of Mrs. Bratton, feminist readers are likely to feel critical of the standardized documents and of standardized contract doctrine that fails to protect and value "feminine" personality traits.[26]

Frug concludes that "the court's analysis . . . might have been different if the court had valued feminine as well as masculine personality traits."[27] If the court had appreciated her desire to take care of the men waiting for her to sign the contract, and if it had understood that she might be enacting a traditional female role of deference to male authority, the court might have both been more skeptical of the idea that her signing was "free" and that enforcement of the agreement promoted, rather than undermined, her autonomy.

Paternalism gets a bad rap because it makes regulations seem to be constraints on free choice. What the critique of paternalism ignores is the possibility that law may restore free choice that was absent because of private power relationships or social norms. Consider the question of job security. Long ago, I argued that it was problematic to assume that if employees wanted the right to be fired only for just cause that they would bargain for it.[28] Under that view, employment-at-will reflects the desires of both employers and employees.

The at-will doctrine allows employers to fire employees for arbitrary or unjust reasons, such as the employee's refusal to violate the law or have sex

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25 Frug, *Re-Reading Contracts*, *supra* note 1, at 1129–30.

26 *Id.* at 1131.

27 *Id.*

28 Jack M. Beermann & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 945–46 (1989).

with the boss.[29] It is not at all clear why this doctrine promotes the will of both parties. One could easily flip the analysis and say that an employer who wants the right to fire workers for refusing to break the law or for refusing to have sex with the boss should bargain for such a right. If the employer would find it too embarrassing to seek such an explicit agreement, then maybe we should not assume that the employment contract should be interpreted to give the employer such entitlements.

Social norms provide the background to all contracting situations. Most people actually think that employers are not entitled to fire them without a good reason. The law (premised on employment-at-will) does not really reflect the expectations of most people. Rules designed to better reflect actual expectations may not be "paternalistic" in the sense that they override individual choice; rather, they may sometimes better align contractual terms with individual choices. When contracting parties have conflicting desires, the law has a role in choosing whose expectations should prevail. That depends on a judgment about which expectations are normatively justified. In such cases, government cannot remain neutral and simply "give the parties what they want"; rather, it must figure out what most people want—or promote the result they would probably want if they had better information or if they thought about the issue from a normative standpoint that adequately reflects the values of liberty, equality, and dignity.

The idea that regulations prevent people from getting what they want assumes that contracts reflect the intentions of both parties. Under that reasoning, workers want to work for low wages inadequate to sustain human life; if they wanted higher wages they would bargain for them or refuse to take jobs at the low wages currently offered. Under this view, minimum wage laws interfere with the ability of workers to get what they want. The reality is that workers want wages sufficient to let them lead a comfortable life. Employers refuse to give them such wages because they have the power to do so. Why do they have this power?

The answer is that the existing distribution of property means that workers must agree to work for such wages or starve; they do not have other sufficient sources of income or wealth to sustain them, other employers do not offer better wages because they are uninterested in doing so, and the competitive economic system leads them to pay the lowest they can in order to maximize profits for shareholders. In other words, the workers want something they do not have the power to get. Enforcing such low wage contracts therefore does not respect the choices of the workers but the market power of the employers. After all, contracts reflect not just willingness to buy but willingness and ability. If workers have no

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29 *See* Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV. 3, 3 (2001). *But see id.* at 4.

alternatives to accepting a minimum wage job that pays too little to live on, they will accept such a job, not because it reflects their desires, but because they have no alternative.

The context within which the bargain occurs shapes not only the terms of the agreement but the values of the actors. Employers feel morally fine offering jobs to employees at low wages and even at no wages (to interns). They do not feel fine making employment conditional on having sex with the boss, partly because this is now illegal and partly because social mores have changed to make this demand unconscionable. They do not feel fine paying employees lower wages if they are African American, again because of changes both in law and in social norms.

All this means that it is facile and misleading to identify contract terms that we observe in the world with the terms "the parties want." Often the parties have different wants, and the terms of the agreement reflect their bargaining power as much as their desires. Bargaining power is not simply a matter of skill but the prior distribution of wealth between the parties and the prior distribution of alternatives to a negotiated agreement. If workers have no alternative to the agreement offered by the employer, then they will agree because they have to, not because they want to. In such cases, the law must determine whether the agreement is sufficiently voluntary and fair to enforce. If the answer is no, then regulation is needed to enable the disempowered party to get what she wants. In such cases, regulation promotes the pursuit of happiness.

Nor does regulation of the agreement inevitably hurt those we are trying to help. It is standard economic reasoning that minimum wage increases should lead to fewer jobs. In the real world, this may or may not be true depending on market conditions. But even if it is true, it is an argument that proves too much. It suggests all regulations of market transactions should be jettisoned. Housing codes make housing safe, but they also increase its costs. If we are setting housing building codes based on the income capacity of the poor, then we will scrap them and have unsafe homes. But the way to help the poor is not to make homes unsafe for everyone else. We set reasonable minimum standards for market relationships, and if the poor cannot afford housing protected by such regulation, then we must help the poor obtain housing in other ways. Either we construct affordable housing devoted to low-income families or we increase their resources so they can afford the housing that the market provides. Either way, the mere fact that a regulation increases costs is not a reason to oppose it. The benefits of the regulation may well outweigh the costs, and any effects that increase inequality can be countered by policies designed to promote equal access to the things needed for a flourishing human life.

The Supreme Court has interpreted the norm of freedom of contract in a way that requires public accommodations to provide services to

customers regardless of their race. In crucial cases decided in 1968 and 1976, the Court ruled that the "right to make and enforce contracts" and the "right to purchase property" protected by the Civil Rights Act of 1866 meant not only that African Americans had the freedom to contract if they could find anyone willing to contract with them, but that they had the right to force public accommodations to contract with them if the only reason for refusing service was their race.[30] Congress agreed with the Supreme Court when it amended the Civil Rights Act in 1991.[31]

Freedom of contract sometimes means freedom from contract. One is free to agree or not to agree.[32] But it can also mean the power to enter the world of the market or private property. If everyone in that world chooses to shun you because of your race, sex, or sexual orientation, then your "freedom" to contract is meaningless. Consider whether a hotel should be free to refuse to allow a same-sex couple to get married in its facilities.[33] If the answer is yes, the freedom of the hotel is enhanced and the freedom of same-sex couples is reduced. We value freedom of action, but we also value living with others in peace. It was John Locke, after all, who reminded us that liberty does not mean anarchy or completely unrestrained action. "Where there is no Law," Locke wrote, "there is no Freedom."[34] If a society is wracked by discriminatory views and if property is maldistributed, then a laissez-faire policy may foster a racially segregated society as effectively as one mandated by positive law. That is why, for example, South Africa needed to pass a public accommodations law after abolishing apartheid.[35]

If our sole goal is to let people make their own choices, we still need law to determine how to interpret what those are when the presumed wishes of one contracting party conflict with those of the other. We also need to determine what regulations are needed to ensure that individuals are not excluded from access to markets not designed for them, such as buildings constructed without attention to their accessibility by persons with disabilities. And we need to consider the relative normative value of

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30 Runyon v. McCrary, 427 U.S. 160, 168–70 (1976); Jones v. Mayer Co., 392 U.S. 409, 422 (1968).

31 Civil Rights Act of 1991, Pub. L. No. 102–66, 105 Stat. 1071 (1991).

32 *See* Todd Rakoff, *Is "Freedom from Contract" Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 488 (2004).

33 For an analysis of this issue, see Joseph William Singer, *Property and Sovereignty Imbricated*, COLUM. L. REV. (forthcoming 2015). S*ee also* Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. Rev. 929, 930–31 (2015).

34 JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 32 (C.B. Macpherson ed., Hackett Publ'g Co. 1980) (1690).

35 Joseph William Singer, *Property and Equality: Public Accommodations and the Constitution in South Africa and the United States*, 12 S. AFR. J. PUB. L. 53, 79–80 (1997).

claims of religious freedom to refuse service because of race or sexual orientation as compared to claims of access to markets and private property without regard to social or racial caste.

It is striking that contracts casebooks pay little or no attention to civil rights. The Civil Rights Act of 1866, as amended in 1991, requires businesses open to the public to engage in contracts without regard to race.[36] It imposes a duty to contract rather than leaving businesses free to refuse to contract. And it interprets this obligation as inherent in "the right to make and enforce contracts." One might think this would be a crucial legal rule underlying our market system and necessary to understand "contract law" in the United States. Yet the contracts casebooks either do not include antidiscrimination law at all or address it in a glancing and marginal manner that divorces it from the core norms of our contract system. That reflects a larger problem. Law schools, for the most part, teach law students that contract law can be learned without paying attention to a single statute.

IV. Democracy

We have seen that regulations may help disempowered people to get what they want. How does this work? Employers operate by a moral code that is different from the moral code governing social relations outside the employment market. They seek to pay the lowest amount possible. Of course, that is not strictly true. Some employers pay more than the minimum, partly because they believe that, over the long run, this will make their businesses more profitable. That suggests that there are various ways to make a profit and the markets do not necessarily push actors to the single best way to make money. But given that market competition can lead employers to exploit workers by failing to invest adequately in safe workplaces and in adequate wages, the best way of achieving those goals is through laws that set minimum standards for market relationships, and place all employers on a level playing field, inducing them to compete in other ways.

Both state and federal law define minimum standards for market relationships compatible with the values of a free and democratic society that aspires to treat each person with equal concern and respect, and thus enables each person to pursue happiness. Every contract we enter into is subject to such minimum-standards regulations defined either by statute or regulation created by an agency empowered to achieve such minimum standard goals.

Employment relations are regulated to prohibit discrimination, promote workplace safety, provide for safe and adequate pensions and

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36 *See* 42 U.S.C. § 1981 (2012); *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

unemployment insurance, and to ensure that workers are not treated like slaves or indentured servants.[37] Insurance and banking contracts are regulated to ensure that companies have sufficient resources to pay out claims when due, to ensure depositors' accounts, and to prevent investment activity that threatens the solvency of the bank, insurance company, or the general economy.[38] Real property is regulated by zoning and environmental law, antidiscrimination law, and other rules designed to free property from restraints on alienation, discriminatory practices, and unreasonable servitudes.[39] Marriage agreements are regulated to promote equality between men and women and to protect the interests of children.[40] Educational institutions, hospitals, and other nonprofit organizations are regulated to ensure that they fulfill their charitable purposes.[41] Consumer agreements are regulated to ensure that consumers are not defrauded or misled and that products are safe and effective.[42]

I could go on. There is simply no agreement, enforceable in court, that is not regulated by statutes that ensure that such agreements satisfy minimum standards of suitability. These statutes are not paternalistic yokes that stop people from getting what they want. Rather, they ensure that people get what they want when they enter market transactions. Of course, it is true that they deny providers and sellers the power to offer terms other than those set by minimum standards regulations; such actors might want to provide such terms, and some consumers would agree to them. In that sense, it is true that regulations outlaw agreements that might exist in the absence of those regulations. But the purpose of these laws is to force those with market power to treat those without market power fairly. It forces sellers to give buyers what they would bargain for if they had the power to do so. We would do well to remember the Golden Rule or John

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37 *See, e.g.*, *Summary of the Laws of the Department of Labor*, U.S. DEP'T OF LAB., http://www.dol.gov/opa/aboutdol/lawsprog.htm (last visited Feb. 9, 2016).

38 Edward V. Murphy, *Who Regulates Whom and How? An Overview of U.S. Financial Regulatory Policy for Banking and Securities Markets*, CONG. RESEARCH SERV. (2015), *available at* https://www.fas.org/sgp/crs/misc/R43087.pdf (outlining banking regulation). S*ee generally* ROBERT W. KLEIN, AN OVERVIEW OF THE INSURANCE INDUSTRY AND ITS REGULATION (2008), *available at* https://www.bipac.net/fsrac/Klien1.pdf (describing the history of insurance regulation in the United States).

39 *See* Joseph William Singer, *Should We Call Ahead? Property, Democracy & the Rule of Law*, 12TH ANNUAL BRIGHAM-KANNER PROPERTY RIGHTS CONFERENCE (Oct. 2, 2015), http://law.wm.edu/academics/intellectuallife/conferencesandlectures/propertyrights/registration/Panel%201/Singer_Online%20Version.pdf.

40 *See* Laurie Shrage, *The End of "Marriage"*, N.Y. TIMES (Nov. 4, 2012, 5:00 PM), http://opinionator.blogs.nytimes.com/2012/11/04/the-end-of-marriage/?_r=0.

41 *See* 26 U.S.C. § 501(c)(3) (2016).

42 *See* FEDERAL TRADE COMMISSION, THE FTC IN 2011 21–24 (2011).

Rawls's veil of ignorance.[43] Minimum standards regulations define the basic terms of agreements that we would bargain for if we did not know on which side of the bargaining table we were sitting. Such regulations give people not only what they want but what they are entitled to receive from the contractual relationship.

The idea that regulatory laws "interfere with freedom of contract" by denying people the power to agree to the contrary fails to grasp the role of "government of the people, by the people, and for the people"[44] in enabling us to get what we want. One way we express our choices is in the world of the market, but another way we express them is in the political arena where we elect representatives who pass laws that set minimum standards for market relationships. If those laws interfere with our getting what we want, why do we have them? We have them because we want them. We want to know products are safe, that banks have enough money to pay us our money when we need it, that insurance companies will honor claims when due, and that buildings will be safely constructed. We agree collectively through democratic procedures to pass laws that set minimum standards for market relationships. Those laws help us get what we want. They then leave us free to bargain about other things.

What is remarkable is that you would know nothing about any of this regulation if you studied contracts through contract law casebooks. While some of the books mention some statutes in a peripheral manner in some notes and cases, the casebooks generally treat statutes as alien to the contract law system. The only statutes treated in depth in the contracts casebooks are the Uniform Commercial Code and the Statute of Frauds. Regulatory laws, like civil rights laws, housing construction laws, workplace safety laws, banking and insurance laws, and consumer protection laws are either entirely absent or marginalized.[45]

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43 *See* JOHN RAWLS, A THEORY OF JUSTICE 118–23 (rev. ed. 1999).

44 Lincoln, *supra* note 2; *see also* Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall"*, 79 B.U. L. REV. 263, 284 (1999) (explaining that government action could limit the freedom of contract).

45 In preparing this article, I canvassed many of the casebooks used to teach contract law and inadequate attention to statutes regulating contractual relationships is a feature of all the books I reviewed. *See generally* IAN AYRES ET AL., STUDIES IN CONTRACT LAW (8th ed. 2012); RANDY E. BARNETT, CONTRACTS: CASES AND DOCTRINE (4th ed. 2008); BRIAN A. BLUM & AMY C. BUSHAW, CONTRACTS: CASES, DISCUSSION, AND PROBLEMS (3d ed. 2012); JOHN D. CALAMARI ET AL., CASES AND PROBLEMS ON CONTRACTS (6th ed. 2011); E. ALLAN FARNSWORTH ET AL., CONTRACTS (7th ed. 2008); BRUCE W. FRIER & JAMES J. WHITE, THE MODERN LAW OF CONTRACTS (3d ed. 2012); LON L. FULLER ET AL., BASIC CONTRACT LAW (9th concise ed. 2013); CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS (6th ed. 2007); GEORGE W. KUNEY & ROBERT M. LLOYD, CONTRACTS: TRANSACTIONS AND LITIGATION (1st ed. 2006); JOHN EDWARD MURRAY, JR., CONTRACTS: CASES AND MATERIALS (6th ed. 2006); ROBERT S. SUMMERS & ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE (6th ed. 2011). One casebook that at least mentions a variety of state statutes

The absence of statutes in contracts casebooks is alarming because it conveys an ideological message. Contracts is about voluntarily undertaking obligations you otherwise have no legal duty to assume. Regulatory laws are relegated to the upper level courses. The message is that regulations constrain or interfere with "freedom of contract" rather than promote it. Such laws appear as oppressive weights on market actors who only want the freedom to act as they please. Leaving such laws out of the contracts casebooks fails to treat such laws as foundations on which contracting happens, as ways to ensure that contracts reflect the will of the parties (or at least consumers), and as necessary supports for the dignity of each person as they enter the marketplace.[46] Regulatory laws setting minimum standards for market relationships are not weights on our shoulders; they are the floor on which we stand.

Statutes engage collective choices about the contexts within which we want to live and the minimum standards that we want to take for granted. Those minimum standards are part of the protected sphere of rights we bring with us when we come to the bargaining table or enter the world of the market to purchase what we want. They define some of the entitlements we own when we enter relationships with others. Minimum standards laws do not take away our freedom; they protect our property. They are shields that enable us to enter the world in safety. Thomas Hobbes told us we needed government because life without it is "solitary, poore, nasty, brutish, and short."[47] Regulations do not deprive us of free choice; they give us the freedom to live in comfort and safety through collective political choices about the contexts of social life. "Where there is no Law," Locke wrote, "there is no Freedom."[48] In her analysis of labor market hostility to working mothers, Mary Joe Frug reminded us that changes in law are often not sufficient to alter social relationships that systematically create and enforce disadvantage.[49] But those social relationships of dignity and equality can only flourish within regulatory structures that protect us from oppression. That means we need law.

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regulating contract is 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION (3d ed. 2010). *See id.* at 254–56 (discussing the Uniform Premarital Agreement Act); *id.* at 400–17 (state statutory regulation of franchises); *id.* at 686–709 (discussing the Federal Arbitration Act); *id.* at 714–18 (state consumer protection statutes).

46 The lack of statutes is striking to a property law professor such as myself. Although property law casebooks also could stand a greater dose of statutes, it is true that most books do have a fair number of statutes as part of the basic curriculum. Those include zoning ordinances, the Fair Housing Act, public accommodation laws, marital property laws, the Uniform Statutory Rule Against Perpetuities, condominium statutes, criminal trespass laws, and state statutes abolishing feudal tenures.

47 THOMAS HOBBES, LEVIATHAN 186 (C.B. MacPherson ed., Penguin Books 1968) (1651).

48 LOCKE, *supra* note 34.

49 Frug, *Securing Job Equality for Women*, *supra* note 16, at 103.

Mary Joe Frug taught us to focus on the social contexts within which human relationships are stifled or flourish. She taught us to pay attention to the complexity of our values. She taught us to value care as well as independence. Ensuring that each person has the freedom to pursue happiness requires a legal infrastructure that provides the space and the resources for human flourishing. That requires laws that set the contexts within which we act and which ensure that we are protected by minimum standards regulations.

Legislation is not "paternalistic" just because it regulates the terms of a contract. Statutes may appear to limit our choices, but they do so in order to enlarge them. Legislation that sets mandatory terms for contracts sets minimum standards that ensure that we get what we are entitled to receive when we enter contractual relationships. So-called paternalistic legislation does not take away our freedom; rather it ensures our freedom. Regulation does not deprive us of choices; it makes them available to us—to each of us. Regulation is not a yoke on our shoulders; it is the floor on which we stand. Democratic law making does not stifle choice; it is the way we exercise choice to determine the conditions of our daily lives that free us to pursue our dreams.