FREEDOM

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Freedom's relationship to law is complex. Law may be freedom's best guarantor, but also may represent a significant constraint on freedom. This conflicted relationship often provides the mortar for a foundation upon which a society is shaped. Given the significance of this relationship, it is not surprising that to celebrate the fiftieth anniversary of the University of Chicago Law School over five decades ago, important figures gathered for a conference contemplating law and freedom.[1] Diverse figures such as philosopher Alexander Meiklejohn, economics professors John Kenneth Galbraith and Aaron Director, and New Jersey Supreme Court Chief Justice Arthur Vanderbilt provided diverse views on the relationship of freedom and the law.[2] Their discussions included topics from freedom in different market places, including economics ones and ones for ideas.[3] They talked about protecting freedoms as tribunals considered matters, including both traditional courts and bodies associated with the administrative state.[4] And they considered the role of economic freedom.[5] Their dialogue reflected how freedom's intersection with law affects so many aspects of life in the past, present and future, and it provides inspiration for a broad analysis of the intersection that explores law's enhancement and limitation of freedom.

LAW'S ENHANCEMENT OF FREEDOM

Perhaps it is appropriate that the published Chicago Proceedings start with the great proponent of free speech and civil liberties, Professor Meiklejohn, who offers his take on political freedom.[6] He self-describes his

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1. *See* UNIVERSITY OF CHICAGO SCHOOL OF LAW , CONFERENCE ON FREEDOM AND THE LAW (Conference Series No. 13, 1953) [hereinafter Chicago Proceedings].
2. *See id.*
3. *See id.* at 3–36.
4. *See id.* at 39–85.
5. *See id.* at 89–111.
6. *See* Alexander Meiklejohn, *The Priority of the Market Place of Ideas*, *in* Chicago Proceedings, *supra* note 1, at 3.

mission as one of provocation in talking of the relative authority of the voting citizenry of the United States and its law-making body, the Congress. In describing an "uncompromising" Constitution, he declares "that Congress and, by implication, the other governing agencies have no authority whatever over the freedom of the political activities of the people of the United States. With respect to politics, as the term is here used, the people are sovereign, and Congress is their subordinate agent."[7] This is a robust assertion of the power of personal liberty of a type that many might most closely associate with freedom related to law. In making such an assertion, Professor Meiklejohn draws on warnings by figures such as Alexander Hamilton, who expressed concern about possible "tyranny of the legislature."[8] As he moves his analysis specifically to an area of great personal concern, the First Amendment, he claims that a mischaracterization of the Amendment as "the principle of Free Speech" focuses on the ability to use any words, noting Justice Oliver Wendell Holmes, Jr.'s observation that one can criminalize the action of counseling murder without violating the Constitution.[9] But while so acknowledging that permissible speech is not limitless, he does not so willingly accept instances where courts balance conflicting national security interests and political freedom by looking to Congress's choice between them.[10] He notes:

> The lawmakers are thus authorized to weigh the conflicting interests of security and freedom and, if the security need seems more important, to deny or abridge the claims of freedom. In a word, when national danger threatens, not only freedom of business but also freedom of thought may be required to give way.
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> That judicial ruling may, I think be challenged . . . . [I]n a society pledged to self-government, it is never true that, in the long run, the security of the nation is endangered by the freedom of the people. Whatever may be the immediate gains and losses, the dangers to our security arising from political suppression are always greater than the dangers to that security arising from political freedom. Repression is always foolish. Freedom is always wise. That

7. *Id.* at 3. He further identifies other freedoms, such as "freedom of business activities" that Congress has authority to limit. *See id.*; *see also* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 1–3 (1948) (contrasting the constitutional status of different freedoms related to matters such as expression and property).

8. *See* Meiklejohn, *supra* note 6, at 6–8.

9. *Id.* at 8.

10. *See id.* at 8–15.

> is the faith, the experimental faith, by which we Americans have undertaken to live.[11]

In concluding his paper, Professor Meiklejohn explains:

> [O]ne of the working principles to which all judicial opinions about political freedom should . . . be expected to conform. It is the principle that, when citizens with their helpers are considering questions of public policy, the government shall not take repressive action against any belief or attitude because it is on one side of the question rather than on another. No plan of action may be outlawed because someone in office thinks it unwise or dangerous or un-American . . . .
>
> To be afraid of ideas, of any idea, is to be unfit for self-government. Any such suppression of ideas about the common good, not only the First Amendment, but the Constitution as a whole, condemns with its unqualified disapproval. The freedom of the market place of ideas, it says, shall not be abridged. That statement proclaims the freedom of the fourth—or, shall I say, of the first—branch of our government. It tells us that, in the planning of the Constitution, the freedom of the voter has top priority.[12]

While Professor Meiklejohn's statements reflect the debates of his own times, their poignancy as part of national debates on the primacy of certain freedoms, and just law's enabling of them, would not be unfamiliar today.

This paper cannot hope to settle such debates, but rather draws on Professor Meiklejohn to illustrate the passion of those who see law's role as supporting particular freedoms. Interestingly, while Professor Meiklejohn might be less concerned about law's support for other freedoms, such as freedom related to business or property,[13] such freedoms can draw equal passion from others. Professor Meiklejohn's fellow conference participant, Professor Director, questions the former's constitutional "distinction between the liberty of owning property and freedom of discussion."[14] Professor Director retorts by emphasizing the value of the "free market for economic affairs" and the value of "voluntary exchange" in maximizing freedom.[15] He notes:

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11. *Id.* at 9.
12. *Id.* at 14–15.
13. *See supra* note 7.
14. Aaron Director, *The Parity of the Economic Market Place*, *in* Chicago Proceedings, *supra* note 1, at 20, 20.
15. *See id.* at 21–22.

> [T]he political economists have shown better insight into the basis of all freedom than the proponents of the priority of the market place for ideas. The latter must of necessity rely on exhortation and on the fragile support of self-denying ordinances in constitutions. The former, on the other hand, have grasped the significance of institutional arrangements which foster centers of resistance against the encroaching power of coercive organization. Failure to appreciate this essential element of freedom protection among students of the law who minimize the importance of the free economic market is especially striking.[16]

More recently, law's support for freedom of contract has drawn attention. This may explain the vigor of debate around whether traditional common law notions of contract law have expired. In *The Death of Contract*, Professor Grant Gilmore provocatively heralded the deterioration of notions of contract law liability relative to the importance of tort liability.[17] In doing so, he drew on Professor Lawrence Friedman's conceptualization of a traditional contract law tied to liberal notions of economic behavior and the free market.[18] This might be characterized as a model of law that ran parallel to notions of laissez-faire:

> In both models, as [Friedman] put it, "parties could be treated as individual economic units which, in theory, enjoyed complete mobility and freedom of decision." I suppose that laissez-faire economic theory comes down to something like this: If we all do exactly as we please, no doubt everything will work out for the best.[19]

In introducing a volume on the freedom of contract, Professor F. H. Buckley notes how Professor Gilmore's 1974 take on the decline of contractual liability was followed by other work that questioned freedom of contract, and "argued for broad interference with personal preferences" and free bargaining associated with negative aspects of "laissez-faire ideology."[20] As the title of the volume suggests, various authors forcefully argue that such contractual freedom has not seen its final days of legal relevance.[21]

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16. *Id.* at 24.
17. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1995).
18. *See id.* at 6–8.
19. *Id.* at 103–04.
20. F.H. Buckley, *Introduction*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 1 (F.H. Buckley ed., 1999).
21. *See generally* THE FALL AND RISE OF FREEDOM OF CONTRACT, *supra* note 20.

LAW'S LIMITS ON FREEDOM

Whatever one's preference for particular types of freedom and passion for law enforcing that preference, understanding law's relationship to freedom requires further appreciation of its apparent, simultaneous limitation of freedom. By constraining behavior with its rules of the game—whether constricting the trading of ideas or more material items—law can be seen to limit absolute free choice on some level. The Chicago Conference participants seem to touch on this issue in interesting ways.

Some of the participants note the significance of rules and set procedures in a free society under the law. For example, Chief Justice Vanderbilt notes the linkage of substantive rights and procedure:

> Any substantive right that cannot be adequately enforced in an appropriate forum cannot truly be deemed a right. At best it is a mere shadow of a right; generally it will prove to be simply a snare and a delusion to its owner. Of what value, pray tell, is a right acquired under a contract or the right to a piece of property or even one's right to personal freedom if, when challenged, it cannot be realized procedurally because of an incompetent judge or juror or lawyer, or by reason of a defective system of courts or of procedure, or an overcrowded docket so far in arrears . . . .[22]

Chief Justice Vanderbilt associates lack of attention to "procedural and administrative aspects of the law" with "bringing the law into popular disrepute."[23] Of course legal procedural and administrative rules state what one can and *cannot* do.[24]

A discussion of such rules is especially interesting given the time it occurred—the 1950s, a post-New Deal era of the administrative state and its rule-emphasizing system. Not surprisingly, administrative law became the focus of a participant, Professor Kenneth Culp Davis.[25] Professor Davis notes the traditional idea of freedom as a "right to be let alone" and therefore one where "the principle enemy of freedom is government."[26] In

22. Arthur T. Vanderbilt, *The Role of Procedure in Protection of Freedom*, *in* Chicago Proceedings, *supra* note 1, at 64, 64; *see also* Richard C. Donnelly, *The Role of the Rules of Evidence*, *in* Chicago Proceedings, *supra* note 1, at 39, 39–53 (discussing evidence's protection of freedom).

23. *See* Vanderbilt, *supra* note 22, at 64.

24. To recognize procedures' ability to act as a constraint, consider Justice William O. Douglas' observation: "The history of man's struggle to be free is in large degree a struggle to be free of oppressive procedures." WILLIAM O. DOUGLAS, AN ALMANAC OF LIBERTY viii (1954). Of course, the solution to these "oppressive procedures" might also be grounded in procedure, such as the ability to confront an accuser. *See id.*

25. *See* Kenneth Culp Davis, *Development of the Administrative Agency*, *in* Chicago Proceedings, *supra* note 1, at 54, 54–63.

26. *Id.* at 54.

his world filled with totalitarianism he accepts the continued importance of "absence of undue governmental constraint" but also sees growth in freedom's meaning to include potentially the provision for basic needs such as "freedom from poverty."[27] He sees expanded freedom in the United States as underlying President Franklin D. Roosevelt's "Four Freedoms" of 1941 that went beyond "intellectual and religious freedom" to include "freedom from want and freedom from fear."[28] But he also sees this expansion of freedom in other documents such as the Universal Declaration of Human Rights, the United Nations Charter, and new national constitutions in locations such as India and Israel that referred to items such as "the right to work, to education and to public assistance" and "an equitable share in the national income and a right to social security."[29] In turning back to the United States and its regulations limiting certain economic activities, Professor Davis explains that Karl Marx failed to anticipate regulatory agencies when predicting revolution would follow from free enterprise. More specifically:

> Under our American system of government-protected, government-guided free enterprise, the government assumes three major obligations with respect to freedom—the negative obligation to refrain from encroaching upon the freedoms protected by our Bill of Rights and the two positive obligations to protect freedom from undue encroachments by other men and to increase freedom from the forces of nature.
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> The expanded obligations of government have given rise to new governmental tools, the chief of which is the regulatory agency.[30]

This robust view of the state certainly indicates the possibility of constraint of actions, and thus arguably some freedoms, as a method for furthering other aspects of freedom. Later in the conference, Professor Galbraith, while noting the need to be careful about it, adds his voice to the possibility of state action enhancing freedom:

> [S]ociety must . . . recognize that different groups will attach different emphases to progress along different dimensions of freedom . . . .

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27. *Id.* at 54–55.
28. *Id.* at 55.
29. *Id.* at 55 (internal quotation marks omitted).
30. *Id.* at 56.

. . . .

> Free choice between given alternatives—producer sovereignty in production and consumer sovereignty in consumption—obviously suggests a minimum of government intervention in the decisions of individuals. On the other hand, steps to stabilize or to increase the income of particular groups may require active government intervention. This is true of measures to counter depression or to provide a minimum wage, or social insurance, or a farm price program. But, by widening the range of choice, they also enlarge economic freedom. Thus state intervention is not antithetical to economic freedom as some so ardently hold. It may only be a design for freedom along a different dimension. On the other hand, we have good reason to look critically at state interference with producer or consumer choice. Any loss here must be for a clear gain in the liberties of the other and larger groups or in the form of larger and more secure returns and the extended choice that these provide.[31]

While some might bemoan inherent conflicts of freedoms and choices, Professor Galbraith at least feels, "There is a dilemma in the enlargement of economic freedom only in so far as we insist on making one."[32] Whatever level of angst one associates with such conflicts, they only continue to raise debate today. In recent times, one need only look at the continued debate over the make-up and powers of the recently constituted Consumer Financial Protection Bureau[33] or the extended controversy associated with raising the federal debt limit to enable further federal spending.[34]

THE MEADOR LECTURES ON FREEDOM

Given the ongoing significance of the intersection between law and freedom, continued study of this intersection is critical. In the Meador Lectures on Freedom,[35] four leading scholars from various fields—Professors Matthew H. Kramer,[36] Mechele Dickerson,[37] Ian Ayres,[38] and

31. John Kenneth Galbraith, *The Nature of Economic Freedom*, *in* Chicago Proceedings, *supra* note 1, at 109, 109–10.

32. *Id.* at 111.

33. *See* Jim Puzzanghera, *As the Consumer Financial Protection Bureau Launches, It Remains Opposed by Most Republicans*, L.A. TIMES, July 21, 2011, at B1, *available at* http:// articles. latimes. com/ print/ 2011 /jul/21/ business/ la-fi-consumer -bureau- 20110721 (last visited Aug. 2, 2011).

34. *See Obama, Boehner Clash on TV in Debt Endgame*, MSNBC (July 26, 2011, 6:28 AM), http://www.msnbc.msn.com/id/ 43864749/ns/politics-capitol _hill/#.

35. The Meador Lectures honor Daniel J. Meador, former Dean of the University of Alabama School of Law and the James Monroe Professor Emeritus from the University of Virginia School of Law.

36. Professor Kramer is Professor of Legal & Political Philosophy at Cambridge University and

Ian Haney López[39]—add their contemporary voices to the important dialogue on law's relationship with freedom.

Professor Kramer builds upon his prior explorations of freedom to discuss freedom's ties to the rule of law.[40] More specifically, he elucidates the subject by contrasting different types of liberty, including the importance of negative liberty that he has emphasized in prior work. In exploring shortcomings of other scholarly visions of freedom's relationship to law, he usefully posits how certain conceptualizations of liberty and notions of inviolable freedoms, if correct, would mean "that everyone living within a society governed in conformity to the rule of law is unfree in all or virtually all respects."[41] Thus, he begins the Meador Lectures' revitalized discussion of freedom by providing an intellectual approach to understanding freedom and what otherwise might seem an insufferable conflict with the law.

Professor Dickerson continues with an account of disappearing financial freedom and the negative ramifications of this occurrence.[42] In an increasingly challenging economic world, choice does not necessarily equate to full freedom. As she explains, "The increase in opportunities for people to exercise their freedom to become overindebted has created an illusion of financial freedom that masks the fact that overindebtedness itself erodes financial freedom."[43] Her account of unregulated free choice of consumer financial products adds to the tradition of scholars like Professor Galbraith, who seek to better understand when state intervention may be necessary to secure a better quality of life and more meaningful freedom.

Professor Ayres explores implications of *ex ante* self-limitations on freedom by individuals through contract.[44] He joins the dialogue with the unique perspective of not only a scholar, but someone involved in a venture "where individuals enter into binding contracts putting money at risk if they fail to meet their goals."[45] This is an innovative approach that might, for instance, help individuals battle bad habits with precommitments to end such habits; and he offers an evenhanded account of *ex ante* use of freedom to limit one's choices by revealing issues with such

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38. Professor Ayres is the William K. Townsend Professor of law at the Yale Law School.

39. Professor Haney López is the John Boalt Professor at the University of California, Berkeley School of Law.

40. *See* Matthew H. Kramer, *Freedom and the Rule of Law*, 61 ALA. L. REV. 827 (2010).

41. *Id.* at 842–44.

42. *See* Mechele Dickerson, *Vanishing Financial Freedom*, 61 ALA. L. REV. 1079 (2010).

43. *Id.* at 1104.

44. *See* Ian Ayres, *Using Commitment Contracts to Further Ex Ante Freedoms: The Twin Problems of Substitution and Ego Depletion*, 62 ALA. L. REV. 813 (2011).

45. *See id.* at 814 .

an approach, including the substitution of other bad habits or limited capacity to tackle too many bad habits through self-control.[46] His account provides important insight into the very personal, individualized exercise of freedom of individuals, which has been so important to others before him.

Finally, Professor Haney López concludes the lectures with a provocative look at mass incarceration and freedom in the continued shadow of racism.[47] He notes, "To understand how a vision of government as a source of freedom has come to be tarnished, we must look to those to whom the state has denied freedom most forcefully—the imprisoned."[48] Thus, in looking at incarceration in America and the racial composition of the prison population, he both seeks to reinvigorate a more open discussion of race's continued impact as it relates to freedom and simultaneously joins a broader historical debate concerning how government action might help deliver freedom. Accordingly, Professor Haney López along with Professors Kramer, Dickerson, and Ayres are worthy inheritors of and contributors to the ongoing dialogue on law and freedom.

46. *See id.* at 814–24.
47. *See* Ian Haney López, *Freedom, Mass Incarceration, and Racism in the Age of Obama*, 62 ALA. L. REV. 1001.
48. *See id.* at 1002.