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**“WE INSIST! FREEDOM NOW”:
DOES CONTRACT DOCTRINE HAVE ANYTHING CONSTITUTIONAL TO SAY?**

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“WE INSIST! FREEDOM NOW”:
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Abstract

On a daily basis countless people are refused contracts due to discrimination on account of their “Otherness” – their race, their disability, their gender, etc. Many of them are not welcomed by hotels, denied service in restaurants, rejected by banks when asking for a mortgage loan, and so on. The variety of transactions that are denied and the breadth of human interaction that they affect are simply overwhelming and result in a fundamental exclusion from the marketplace.

For years contract law has ignored this problem, while exclusive responsibility for contractual discrimination has been reserved for constitutional law and the antidiscrimination statutes that were enacted to fulfill egalitarian ideals. This Article attempts to break the contractual silence and to bridge the huge gap between discrimination and contracts by pressing up against traditional legal boundaries. Drawing on a broad understanding of the Thirteenth Amendment - as a promise of an egalitarian and mobile economy which heavily relies on contracts - the Article calls for addressing the problem of precontractual discrimination with contractual tools. Such a possibility has until now remained by and large unexplored, but as this Article seeks to show, it is an achievable and powerful step that can be well-integrated into up-to-date contract theory.

The Article first exposes the detachment between contract doctrine and the scattered antidiscrimination norms and analyzes the harmful consequences of this detachment. It then creates an original meeting point between the two bodies of law, one of which is intentionally located *within* contract doctrine. This point is found by dismantling the dominant concept of “freedom OF contract”, and especially by defining and establishing the freedom *to make* a contract.

The novel insistence on the “freedom TO contract” – which gives the Article its name – is to be enforced, as proposed, through the duty to negotiate in good faith. Breaking contractual negotiations for discriminatory reasons, it is argued, should be seen as illegitimate business behavior, as an overt expression of bad faith that carries liability. One basis for imposing such precontractual liability can be found by applying to the issue of discrimination the “no-retraction” principle that was recently developed within the economic school of thought. Such reasoning is part of a more general effort to go beyond the opposition between equality and freedom by answering affirmatively the question raised by the Article’s title: contract law *has* something constitutional to say and it is the commitment and enforcement of the essential freedom to contract.

“WE INSIST! FREEDOM NOW”:
DOES CONTRACT DOCTRINE HAVE ANYTHING CONSTITUTIONAL TO SAY?

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“WE INSIST! FREEDOM NOW”¹:
DOES CONTRACT DOCTRINE HAVE ANYTHING CONSTITUTIONAL TO SAY?

“*The subject of ‘freedom of contract and constitutional law’ has provoked little discussion in the United States*”
(E. Allan Farnsworth, 1998)²

Introduction

Jackie Robinson was an extraordinary baseball player, but until 1947 he – like every other black player before him – was not allowed to play in the Major Leagues. The team owners refused to contract with him because of his race. Later, when he traveled with his team, the Brooklyn Dodgers, he was often not allowed into the hotels where his white teammates spent the night. The hotel owners refused to contract with blacks.³ Stories of this type are all too frequently told in past tense, often opening with words such as “once upon a time” - as if to soothingly indicate the anachronistic nature of the reality related therein.⁴ This is a misleading tone. Decades have passed but discrimination is still here with us, stubbornly surviving years of social and legal combat.

On a daily basis countless people are refused contracts due to discrimination on account of their “Otherness” – their race, their disability, their gender, etc. Like Jackie

¹ Max Roach’s protest album “*We Insist! Freedom Now Suite*” (Candid/Columbia, 1960) is one of the defining statements of America’s black civil rights movement. The adoption of Roach’s album-title here reflects the theme of this Article – the insistence on the urgent need to take better care of the freedom TO contract in order to ensure more equality.

² In the memory of Prof. Farnsworth who passed during the final stages of writing, this Article is a humble attempt to break this silence. The quote is taken from E. Allan Farnsworth, *Freedom of Contract and Constitutional Law: United States Report*, in FREEDOM OF CONTRACT AND CONSTITUTIONAL LAW (Mordechai Rabello and Petar Sarcevic, eds.) 261, 261 (1998).

³ See PETER GOLENBOCK, *TEAMMATES* (1990).

⁴ See, e.g., GOLENBOCK, *id.* This is a children’s book that as such has endless educational influence. The opening line of the book reads: “Once upon a time in America, when automobiles were black and looked like tanks and laundry was white and hung on clotheslines to dry...”

Robinson many of them, even today, are not welcomed by hotels,⁵ cannot hail a taxi,⁶ sit in restaurants waiting in vain to be served.⁷ Others, looking for an apartment, call in response to advertisements and set up appointments, only to be falsely told, when their “Otherness” is discovered, that the apartment has already been rented.⁸ Similarly, some

⁵ See, e.g., *United States v. HBE Corporation d/b/a Adam's Mark Hotels*. In this litigation the HBE Corporation, which operates 21 Adam's Mark Hotels and Resorts throughout the country, was sued for racial discrimination. The US government's complaint alleged a pattern of denial of the full enjoyment by non-white persons of services, facilities and accommodations offered by the Adam's Mark hotel throughout the country. The case was settled on December 2001. For the case summary see: www.usdoj.gov/crt/housing/documnets/casesummary.htm (last visited Feb. 20, 2005).

⁶ See, e.g., *Bolden, et al. v. J&R Incorporated, et al.*, 37 Fed. Appx. 543; 2002 U.S. App. (Joel Bolden, an African American, and Len Silvia, a Caucasian sought to share a taxicab ride from a restaurant to their apartment in Georgetown. The driver pulled over and stopped to pick up Mr. Silvia, but when he saw Mr. Bolden approach the cab as well, he started to drive away, at the exact moment Mr. Silvia was attempting to get into the cab. Mr. Silvia was eventually able to enter the cab, as was Mr. Bolden, who chased after the cab as it was dragging his friend up. The driver told Mr. Silvia: "I take you, but not him." The driver further refused to stop the cab to allow Mr. Bolden to summon police assistance, and ultimately refused to take them to their home.) The litigation is reported by the Washington Lawyer's Committee as a significant and precedential victory since "race discrimination in the provision of taxicab service within the District of Columbia is a severe and wide problem that largely has been unremedied through civil rights litigation." For the report of the case see: www.wshlaw.org/projects/public_accommodation/default.htm (last visited Feb. 20, 2005); See also Note, *Taxi! Why Hailing a New Idea about Public Accommodation Laws May Be Easier than Hailing a Taxi*, 37 VA. U. L. REV. 929 (2003).

⁷ See, e.g., *Robert Lloyd & Minire Lloyd v. Waffle House, Inc.* 347 F. Supp. 2d 249; 2004 U.S. Dist. LEXIS 25071. In this case the plaintiffs, an interracial couple, decided to dine at the defendant restaurant but sat at the counter and then in a booth for 45 minutes and were not offered service by the restaurant's waitresses, while white individuals entering after them were offered service, ordered, and were served their food by the same waitresses in the same period of time. It is one of a series of lawsuits initiated by The Washington Lawyers' Committee, along with co-counsel, against Waffle House Inc., and in certain cases, Waffle House franchisees, on behalf of individuals who allege they were discriminated against on the basis of race while attempting to patronize various Waffle House restaurants in North Carolina, South Carolina, and Georgia. See THE WASHINGTON LAWYER'S COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, 2004 FOURTH QUARTER REPORT (11/18/04) available at http://www.washlaw.org/news/washlawqtr/nwlq_housing_accomm.htm#public_accommodations (last visited Feb. 20, 2005).

⁸ See, e.g., John Baugh, *Linguistic Profiling*, in BLACK LINGUISTICS: LANGUAGE, SOCIETY, AND POLITICS IN AFRICA AND THE AMERICAS 155, 158-9 (Sinfree Makoni et al. eds., 2003). ("I moved to Palo Alto first in search of accommodations that would serve my entire family. Any reader who has ever tried to rent a home or apartment knows the experience of scouring the classified advertisements and then calling to make an appointment. During all calls to prospective landlords, I explained my circumstances, as a visiting professor at [Stanford], always employing my 'professional voice,' which I am told 'sounds white.' No prospective landlord ever asked me about my 'race', but in four instances I was abruptly denied access to housing upon arrival for my scheduled appointment." See also Dawn L. Smalls, *Linguistic Profiling and the Law*, 15 STAN. L. & POL'Y REV 579, 582 (2004) (quoting Baugh and adding: "Baugh is more skilled than most. Most African Americans do not have the ability to 'sound white' and thereby elude linguistic profiling. A more typical experience is recounted by a 1994 study by Feagin and Sykes. 'She called' and they told her that the apartment was rented. And she called [a friend] on the phone and said 'I'd like for you to call them ... because you sound like a white person.' And the friend called and the apartment was still unrented.")

are rejected by banks when asking for mortgage loan,⁹ or cannot buy homeowner's insurance.¹⁰

Another recent example that will be used throughout this Article is the case of Jesse Williams, a student who had just moved to Virginia and "attempted to purchase a printer cartridge at the Staples office supply and photocopying store in Winchester, Virginia."¹¹ The Staples clerk refused to accept Williams' out-of-state (Maryland) check and he had to leave the store without making the purchase. When Williams related the story to a few of his university classmates, his friend Heather Hutchinson told him that on that same day she had paid at Staples with her out-of-state check (also from Maryland), and no one had refused her check. Williams is black, his friend is white. Testers were sent to Staples and the story repeated itself.¹²

The variety of transactions that are denied and the breadth of human interaction that they affect are simply overwhelming. The result can be an accumulated, fundamental exclusion from the marketplace that is tremendously significant and disparaging on economic, social and emotional levels. The legal challenge is, of course, to find how law can better help in resisting the impulse to discriminate, the impulse that here manifests

⁹ See, e.g., *The United States v. Albank* The bank refused to take mortgage loan applications from areas in Connecticut and New York with significant minority populations and failed to explain the elimination of these areas from its lending areas. The case was resolved with consent decree. For the case summary see <http://www.usdoj.gov/crt/housing/documents/casesummary.htm>.

¹⁰ See, e.g., *United States v. American Family Mutual Insurance*. In this case race was used by the defendants as a factor in determining whether to issue homeowner insurance policies in the Milwaukee metropolitan area. It was resolved in a consent decree according to which over 1,600 households received damages. For the case summary see <http://www.usdoj.gov/crt/housing/documents/casesummary.htm>.

¹¹ *Jesse J. Williams v. Staples, Inc.* 372 F.3d 662 (4th Cir. 2004).

¹² The Staples Case, *id.*, was first litigated and then, after the court decided to dismiss Staples motion for summary judgment, it was settled for \$50,000 before trial. The outcome was reported by the lawyers who represented Williams on a pro-bono basis together with the Washington Lawyers Committee for Civil Rights and Urban Affairs. See <http://www.hklaw.com/CST/MajorCases/CaseDetail.asp?ID=120> (last visited Dec. 20, 2004).

itself through contracts.¹³ For years the responsibility for this challenge has been assigned to constitutional law and the antidiscrimination laws that were enacted to fulfill those egalitarian ideals that the constitution was seeking to protect. If asked, the typical contracts scholar would probably say that dealing with the phenomenon of contractual discrimination is not a matter for contract law – that it lies outside the realm of contract doctrine.

This Article attempts to bridge the huge gap between discrimination and contracts. While pressing classical legal boundaries it seeks to break a long tradition of mutual exclusivity between the two arms of law: the one that is supposed to fight discrimination and the one that is expected to support transactions. Within this framework the Article focuses on situations in which people are deprived of their constitutional right *to make* a contract, i.e. when the discrimination materializes at the *precontractual* stage, as a refusal to even enter into a contractual relationship with people who are labeled as belonging to certain long-deprived groups. Such refusal sabotages these people's basic access to the marketplace and their ability to participate in its activity. This severe problem, it is hereby maintained, should be addressed by contractual tools that are constitutionally sensitive.

Up until now, the possibility of addressing discrimination with contractual tools has remained largely unexplored. Even the very few who have considered this option

¹³ The argument is not that the law is the only or even the best way to defeat discrimination. To skepticism regarding the ability of law to create social change in general *see* GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). For a similar approach in the context of racial discrimination and legal achievements such as *Brown v. Board of Education* [347 U.S. 483 (1954)] *see* MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2004). *See also*, David E. Bernstein and Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 *YALE L. J.* 591 (2004) (a book review of Klarman's book that analyzes critically the above skepticism.) Rather, the notion is that as much as law is able to have influence it should be utilized to do so in the most effective way.

have fallen short in illustrating how it can prove fruitful. This Article emphasizes the importance of such a contractual alternative and seeks to demonstrate not only that the use of contractual tools is a *promising* step to take - but also that it is a powerful and attainable step that can be well-integrated into current theory – including economic analysis – of contract law.

To do so the Article first exposes the dramatic and harmful detachment between contract doctrine and the scattered norms of antidiscrimination. It then creates an original meeting point between the two bodies of law. This meeting point is intentionally located *within* contract doctrine and it is suggested that in order to find it we need to go back to the fundamental and powerful concept of “freedom of contract” and dismantle it. The key is defining and establishing the freedom *to make* a contract, an essential stage in reconstructing an alternative discourse that is neither “public” nor “private” and, at the same time, which engages in both “public” and “private” concerns. Along the way a special effort is made to use one shared language which is based on contractual logic rather than on critical theories that share a more direct and absolute belief in the supremacy of the value of equality. This is indeed an “effort” for anyone who believes in the ideal of egalitarian society, but it is an effort worth making if one is interested in achieving more than what has been achieved under the current legal regime. As part of this effort the Article espouses the liberal and individual standpoint that underlies contract doctrine and even builds on a new theory that was originally developed by the law and economics school of thought with little attention to equality.

Two clarifications regarding the scope of the project seem in place: the earlier goes to the precontractual focus and the later has to do with the emphasis on race. The

Article is limited to the pre-contractual phase for three main reasons: First, from the victims' perspective their exclusion from participating in the contractual game reaches its peak when a contract is denied and they are blocked from access to the marketplace. Second, the contract doctrine's reluctance to address the problem of discrimination is particularly evident when the discriminating behavior takes place before a contract is reached – the absence of a contract reinforces the general tendency to treat the issue as not having contractual nature. Finally, and as result of the previous point, until now there has not been much, if any, focus on the special questions that arise with respect to the precontractual phase, whereas the need for contractual treatment of discrimination during the lifetime of the contract and upon its termination has already been discussed in several works.¹⁴ Within this limited scope the Article will offer analysis that is relevant to discrimination on different grounds, such as gender, age, sexual identity, religion, disability, familial status, and so on.¹⁵ However, during the research process it became clear that race-based discrimination, mainly against African-American people, presents an especially persistent problem, unique in its frequency, range and depth. While this entailed a focus on the refusal to contract with African-Americans, particularly in the examples that are given, the Article's core analysis is entirely applicable to other grounds of discrimination.

The Article proceeds in five parts. Part I reviews the legal treatment of the problem of discriminatory refusals to contract under constitutional law and antidiscrimination statutes. It opens with the Thirteenth Amendment as the norm that

¹⁴ See *infra* Part II.D. and note 143.

¹⁵ Note that as long as the list can be it should still be limited to groups whose members face difficulties that they *cannot escape* and who pay a price for being different from the imaginary "normal" person. For instance, the analysis in this Article *does not* cover refusal to contract with people who behave rudely or suffer from financial problems in ways that deter their potential partner.

should be read as a promise that all citizens will have the freedom to “buy and sell when they please” and that “a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.”¹⁶ It then proceeds to the legislative attempts to satisfy this constitutional promise: the hybrid patchwork of antidiscrimination laws that are targeted at different kinds of contracts. The account is limited to the canvassing of the main statutes that have contractual bearings and does not attempt to offer a nuanced description of the many laws that govern discrimination. Rather, it seeks to emphasize the contractual nature of the reality that is covered under these laws.

The discussion of the current contract doctrine is at the core of Part II. It exposes a remarkable lack of contractual legal analysis of the issue – indeed, the most common manner in which contract doctrine deals with the problem of discrimination is by not dealing with it at all. An attempt is made in this section to listen to “the sound of silence” and to capture the various forms of evasive contractual responses - ranging from complete disregard of the issue, through some degree of marginalization, to harsh resistance to any form of anti-discriminatory regulation. With very few exceptions, contract doctrine refuses to let contractual discrimination in, even though the typical situations are completely contractual in nature and beg a contractual response.

If the first two parts portray the façade of a schizophrenic legal approach, then Part III presents an effort to look beyond it to the basic structure upon which it stands. Although the protection of equality under constitutional and antidiscrimination norms has contractual origins and vast contractual content, somehow the law divides the undividable. This separation of locus is accompanied by a series of dichotomies: contract law is “private” while discrimination is “public”; the former is focused on economy

¹⁶ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 443 (1968).

whereas the latter is of a social nature; the realm of contracts is dominated by whites while discrimination controls the lives of blacks. The argument made in this part is that this cumulative structure of opposites creates a multilayered segregation between the marketplace and the reality of inequality. This yields two discourses that are so distanced and alien that the chances for fruitful communication and improvement are severely diminished.

The shift from defining the problem to seeking its solution begins in Part IV of the Article. Resisting the traditional adversary structure, this section is based upon a reconstructive effort. The new approach tried here is to include the discriminators' liberties and their victims' rights in one unified discourse and to consider their freedoms simultaneously – using contractual language and logic. The process starts with analysis of the major harms caused by the segregated discourses. It is maintained that the greatest hazard is the worsening of the problem of discrimination, mainly through escalation of the resentment and antagonism between those individuals traditionally analyzed under contract law and those traditionally considered under the antidiscrimination norms. What follows is a contractual model that seeks integration. The model is founded on a dismantling of the cliché of “freedom OF contract” - which is critiqued as being too narrow and far too excluding - and replacing it with an acknowledgment of a myriad of freedoms. The main innovation here is the emphasis on the freedom TO contract – the basic ability to make contracts and to freely participate in the contractual world. This is an aspect of the contractual freedoms that by and large has remained invisible within contract doctrine, since it has been taken for granted by those who always enjoyed it. The translation of the requirement of equality into contractual language facilitates a nuanced

balancing between equality, now conceptualized as a type of contractual freedom, and the traditional argument of freedom OF contract. Once the freedoms are discussed in tandem, with special attention to the actual scope and meaning of each, it becomes harder to dismiss the claim for participation in the market - the claim that under the current regime does not even have a contractual name.

Part V implements this theoretical model of freedoms by suggesting a path to the establishment and reinforcement of the freedom TO contract within contract doctrine. What is proposed is to adopt the more generous versions of the contractual duty of good faith - those that extrapolate the duty from the contractual period to the pre-contractual phase - and within them to identify discrimination as illegitimate business behavior, as an overt expression of bad faith.

In a methodology that fits the Article's substance, the second portion of part V then crosses yet another boundary, this time the boundary between legal schools of thought, adding "law and economics" reasoning to the initial "law and society" suggestion to categorize precontractual discrimination as negotiation in bad faith. The new "no-retraction" principle, recently developed by Prof. Omri Ben Shahaar,¹⁷ is applied here to the discriminatory realm and offers a further justification of the imposition of precontractual liability on discriminators who choose to withdraw from negotiations due to their discriminatory "tastes". Interestingly, the supportive effect seems mutual: the "no-retraction" model empowers the freedom TO contract while its application to situations of precontractual discrimination appears to strengthen the validity and efficacy of the no-retraction principle itself.

¹⁷ Omri Ben Shahaar, *Contracts without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829 (2004).

Following the last point of mutual contribution, the Article concludes with a dual call, made from both the perspective of those who believe in the burning need to defeat discrimination and from the perspective of those who are concerned more generally with maintaining the centrality of contract doctrine within the legal system. The latter of the two argues that contract doctrine has an important role to play within our jurisprudence: it serves as an essential and unique arena within which the struggle for freedom, the freedom to make contracts, may have a better chance to prove successful. Incorporating the demand of contractual freedom in the contractual discourse is not only very natural but also tremendously beneficial - and urgent. As both of the above calls illustrate, the Article replies in the affirmative to the question raised by its title – contract law *has* something constitutional to say, and clear insistence on the freedom to contract is a crucial component of an equal society.

I. The Constitutional Promise of Equal Contracting and its Statutory Implementation

While classical contract doctrine to a large extent ignores questions of discrimination in general, and especially the question of refusal to contract, the civil rights arena contains many scattered statutes that are all aimed at dealing with this problem. Some scholars have been using the term “Antidiscrimination Law” to describe the body of statutes that deals with inequalities.¹⁸ Even though this terminology is very useful and shall be used here, it is worth noticing its misleading potential, for in fact

¹⁸ See, e.g., IAN AYRES, *PERVASIVE PREJUDICE? :UNCONVENTIONAL EVIDENCE OF RACE AND GENDER DISCRIMINATION* (2001); ROBERT C. POST, *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* (2001).

“Antidiscrimination Law” is more of a patchwork - a significant disadvantage when it comes to practical enforcement.

Some of these statutes are focused on contracts in general, whereas others are dedicated to particular types of contracts such as housing or employment. Some of these laws are federal while others are State-made. Many of them cover a specific discriminated group - say people of color,¹⁹ the elderly,²⁰ or the disabled²¹ - whereas others are more general in nature.²² Since the main concern here is *contractual* - the attitude of the *contractual doctrine* toward the issue of discrimination - I will limit myself to a rough sketch of the more relevant parts of this legal clutter. My main purpose is not the discussion of these norms in and of themselves, but rather to suggest the strong historical and substantive connection of these norms to the world of contracts.

A. The Thirteenth Amendment

The Thirteenth Amendment is most known for the promise of uprooting the institution of slavery. It provides:

“Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

¹⁹ Civil Rights Act of 1866 (codified as 42 U.S.C. §1981, §1982)

²⁰ The Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202, 81 Stat. 603 (codified as 29 U.S.C. §621).

²¹ Title III of the Americans with Disabilities Act of 1990 (ADA). For a recent analysis of the scope of this Act *see, e.g.*, Nancy J. King, *Website Access for Customers with Disabilities: Can We Get There from Here?*, 2003 UCLA J. L. Tech. 6; *see also* Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. JOURNAL 1, 3 (2004) (“while the ADA’s achievements must be celebrated, the statute’s limitations have become increasingly apparent.”).

²² For example in the employment context 42 USCS § 2000e-2 reads: “It shall be an unlawful employment practice for an employer--(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

Section 2. Congress shall have power to enforce this article by appropriate legislation.”²³

However, the Thirteenth Amendment deserves present-day attention even though slavery is long gone. In the last few decades it has been interpreted in a broad manner²⁴ as guaranteeing liberty, universal freedom and equal citizenry to all human beings.

According to such reading the Amendment encompasses a deeper and more substantive protection of “the right of individuals to make and pursue meaningful life decisions”.²⁵

The connection to slavery is maintained by viewing any limitation of the protected liberties, freedoms or rights as a potential “badge of slavery”. Much of the above expansive comprehension of the Thirteenth Amendment is based on its historical background. It is connected to the *intentions* of Congressmen and legislators, who meant to achieve more than a formal ending of slavery and shared a dream of an integrated egalitarian society.²⁶

Although it is often shadowed by the Fourteenth Amendment, the Thirteenth Amendment has greater relevancy to market activity and to the protection of the equal

²³ U.S. CONST. amend. XIII.

²⁴ For the historical and contextual background of the Thirteenth Amendment and to the changing approaches to its scope see Alexander Tsesis, *Furthering American Freedom: Civil Rights & the Thirteenth Amendment* 45 B.C. L. REV 307 (2004).

²⁵ *Id.* at 361.

²⁶ Barry Sullivan, *Reconstructing Reconstruction: Historical Reconstruction, Reconstruction History, and the Proper Scope of Section 1981*, 98 Yale L.J. 541, 564 (1998) (“The Thirty-ninth Congress was committed to securing “practical freedom” for the Freedmen. The historical materials show that Congress’ attention was not focused entirely on the official acts of truculent Southern judges, legislators, and other public officials. Nor was Congress concerned only with statutes that discriminated in explicit terms against the Freedmen. On the contrary, Congress was well aware of the role played by private discrimination in the South’s recalcitrant refusal to accept the necessary consequences of the Civil War, and it intended to provide a remedy for such discrimination. Furthermore, since it was acting pursuant to the Thirteenth Amendment, Congress was not doctrinally obligated to parse the public and private qualities of the obstacles which white Southerners were bent on interposing in the path of Congress’ legislative goals.”)

right to contract.²⁷ According to the current judicial approach the Fourteenth Amendment is State-based and cannot help when it comes to private discriminators, while the Thirteenth Amendment was released from a similar restrictive reading back in 1968.²⁸ This distinction makes the Thirteenth Amendment a suitable site for creative antidiscrimination activism, mainly by way of adding to the civil rights legislation – based on the mandate given to Congress under the second section of the Amendment.

For the contractual focus of the current analysis it is essential to recall that despite the vast potential of the Thirteenth Amendment to cover the discriminatory denial of contracts, the ability of a private person to bring a cause of action that is based directly and independently on the Amendment has not been established.²⁹ Such direct use of the first section of the Amendment is especially important when the discriminatory behavior is not covered by an antidiscrimination law that was enacted under its second section. The question then would be if contract law can offer itself as a platform through which the constitutional ideas that originated in the Thirteenth Amendment can be enforced. This question will stand at the core of the discussion in the last two parts of this piece. In the meantime, what follows is a closer look at central antidiscrimination laws that are strongly tied both to contracts and to the Thirteenth Amendment and its background.

B. Civil Rights Act of 1866 (42 U.S.C. §1981 and §1982)

When focusing on contracts the most powerful and direct statement regarding discrimination is to be found in 42 U.S.C. §1981, which prohibits racial discrimination in the contracting process. In its relevant part the section maintains:

²⁷ Tobias B. Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 COLUM. L. REV. 973, 1007 (2002) (Maintaining that in the absence of a state action requirement the Thirteenth Amendment has a significant bearing on “private social and economic relationships”).

²⁸ See *infra* notes 32 to 39 and the accompanied text.

²⁹ See, e.g., Tthesis, *supra* note 24, at 344-349.

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts.”³⁰

To complete the contractual idea, and to close the circle of commercial activity, section 1982 follows, and establishes the equal right to own property. Section 1982 provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold, and convey real and personal property."³¹

Originally enacted as part of the Civil Rights Act of 1866, this pair of sections was intended to implement the promise of the Thirteenth Amendment and its goals by translating the Amendment's declaration into practical economic matters in market language.

Interestingly to the present focus on the private rejection of someone from becoming a party to a contract, there were long years in which the courts, following the landmark 1896 decision of *Plessy*,³² read neither the Thirteenth Amendment nor sections 1981 and 1982 as creating a positive right on the part of blacks to make contracts and to actively participate in the market on an equal basis. The *Plessy* Court emphasized:

"It would be running the slavery argument into the ground,' . . . 'to make it apply to every act of discrimination which a person may see fit to make as to the guests

³⁰ Section 1981 was amended in 1991 to read as follows:

“(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.”

³¹ 42 USC §1982.

³² See *Plessy v. Ferguson*, 163 U.S. 537 (1896).

he will entertain, or as to the people he will . . . deal with in other matters of intercourse or business."³³

This refusal to acknowledge a meaningful and pragmatic positive right to make contracts rendered practically ineffective both the Thirteenth Amendment and the accompanying portion of the Civil Rights Act of 1866 now codified as sections 1981 and 1982. If white people, with whom political, economic and social power resided, were free to discriminate as they saw fit, then the guarantee of equal rights to contract was nothing more than a mere puff. Narrowing the rights to make contracts and own property to rights that are protected only against State action,³⁴ offered the freedmen little or no help: for the most part they needed shelter, food, employment, clothing and so on – things they could, or could not, negotiate and buy in the private market, with no engagement whatsoever with the official State.

For our purposes it is important to realize the long-lasting legitimacy of the discriminatory refusal to contract. When Barbara and Joseph Jones sought to purchase a home in Missouri they were rejected by the owner, Alfred H. Mayer Co., who openly declared in court a general policy not to sell to Negroes. The year was 1966 and the District Court in Missouri held that the "defendants did no more than politely refuse to enter into a contract of sale with plaintiffs;"³⁵ and added that the Jones' have no "rights to compel an unwilling seller to convey his property to them in the absence of a statute so requiring."³⁶

³³ *Id.* at 543, (quoting the Civil Rights Cases, 109 U.S. 3 (1883), at 24-25).

³⁴ *See, e.g.,* Joseph W. Singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 NW. U. L. REV. 1283, 1431 (1996) ("Prior to *Jones v. Mayer*, . . . sections 1981 and 1982 were thought to apply only to 'state action.'").

³⁵ *See Jones v. Alfred H. Mayer Co.*, 255 F. Supp. 115, 129 (E.D. 1966). For a more elaborate discussion *see, e.g.,* Florence W. Roisman, *The Impact of the Civil Rights Act of 1866 on Racially Discriminatory Donative Transfers*, 53 ALA. L. REV. 463, 477-480 (2002).

³⁶ *Jones, Id.* at 127.

Only in 1968, after years of bitter civil rights battles, did the Supreme Court reverse this holding and decide, in the celebrated *Jones vs. Mayer* case, to extend the protection of sections 1981 and 1982 beyond states actions, bringing to life the spirit of the Thirteenth Amendment. Following the revolutionary *Jones* decision the courts struck down private discrimination in many contract matters,³⁷ and most pertinently for our purposes expounded that sections 1981 and 1982 also proscribe discriminatory refusals *to enter* into a contract.³⁸ For a while the courts advanced the battle for equality in the broad manner in which they continued to construe sections 1981 and 1982. Later, when the courts appeared more restrictive and limited the scope of these sections, Congress intervened by legislating the 1991 Civil Rights Act.³⁹ As of today sections 1981 and 1982 are taken as the most direct legal treatment of the problem of contractual discrimination. Yet, as stated earlier, these sections are not the only statutes that have a bearing on the question of contractual discrimination at hand.

C. Additional Civil Rights Legislation

1. Civil Rights Act of 1964 (42 U.S.C § 2000)

Title II of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, religion or national origin and therefore covers a wider range of possible grounds for refusal to contract than sections 1981 and 1982 that were discussed above. On the other hand, Title II is limited to places of “public accommodation, as defined in

³⁷ One of the landmarks was applying section 1981 to a contract with a private school in the well-known decision in *Runyon vs. McCrary*, 427 U.S. 160 (1976).

³⁸ Katrina Grider, *Hair Salons and Racial Stereotypes*, 12 HARV. WOMEN’S L. J. ,99 (1989).

³⁹ In *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), the Supreme Court held that section 1981 is inapplicable “to conduct which occurs after the formation of a contract and which does not interfere with the right to enforce established contract obligations.” *Id.* at 171. Following this decision the 1991 Civil Rights Act denoted as section 1981(a) what had been section 1981, and added new section 1981(b), which defined the term “make and enforce contracts” as including “the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.” Civil Rights Act of 1991, 42 U.S.C. § 1981 (1994).

this section” and in that sense is narrower than sections 1981 and 1982, which apply to any discriminator regardless of business structure or location. Contrary to some popular beliefs, Title II does not prohibit discrimination in any place open to the public - barbershops and beauty parlors, for instance, are not included in its scope.⁴⁰ More generally and more significantly it seems that under Title II retail stores are not restricted in their right to exclude potential buyers on discriminatory grounds, and the victims of those stores need to satisfy the conditions of sections 1981 and 1982 in order to obtain relief.⁴¹ Additionally, Title II does not apply to places that are not open to the public at all, such as private homes. As a result it does not ban a discriminatory refusal to rent a room or a residential unit in the owner’s home.⁴²

In general the connection of this antidiscrimination statute to the refusal to contract is made through the contractual nature of the right to enter places of public accommodation as well as the right to fully and equally enjoy the services rendered upon admittance to those places. In a sense, the picture in which a black person is left standing outside the locked door of a clothing store while white people are shopping freely inside captures neatly the deepness of the rejection entailed in the discriminatory refusal to contract.⁴³

⁴⁰ Grider, *supra* note 38 at 89. On the other hand the act covers barber shops which are located within the physical premises of a place of “public accommodation” such as a hotel or motel.

⁴¹ The definition of “public accommodation” under Title II is much narrower than the definition of the same term under ADA – in general it covers mainly hotels, restaurants, theatres and stadiums, *see* 42 U.S.C. §2000a(b)(1)-(4).

⁴² Title II specifically excludes a “building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence.” – 42 U.S.C. §2000a(b)(1). On the background to this exemption also known as the “Mrs. Murphy’s exemption” *see infra* Part I.D.

⁴³ *See* PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS*, 44-51 (1991).

2. Civil Rights Act of 1968 - Fair Housing Act

The housing sub-market is covered by a special antidiscrimination legislation. Title VIII and Title IX of the Civil Rights Act of 1968 - commonly called the Fair Housing Act (FHA) - prohibit discrimination in the sale, rental or negotiation of housing.⁴⁴ The FHA originated from racial concerns,⁴⁵ mainly the need to respond to the assassination of Dr. Martin Luther King, Jr. and to the publication of the Kerner Commission Report with its apocalyptic statement that the country was "moving toward two societies, one black, one white - separate and unequal."⁴⁶ Despite this background, the FHA's antidiscrimination command now applies to broader foundations of discrimination and is not limited to racial grounds.⁴⁷ In this regard the FHA is similar to Title II and far more inclusive than Sections 1981 and 1982.

Most relevant to the focus of the current discussion is §3604(a), which holds it unlawful:

"to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."⁴⁸

The contractual aspect of the FHA is quite clear: both buying and renting a place of residence are transactions that are completed by contracts; indeed, for many they

⁴⁴ 42 U.S.C. §3601. *See generally* 15 AM JUR 2D CIVIL RIGHTS § 380.

⁴⁵ Robert G. Schwemm and Michael Allen, *For the Rest of Their Lives: Seniors and the Fair Housing Act* 90 IOWA L. REV. 121, 143 (2004).

⁴⁶ Nat'l Advisory Comm'n on Civil Disorders, Report of the Nat'l Advisory Comm'n on Civil Disorders 1 (1968).

⁴⁷ Three additional bases of prohibited discrimination are now part of the FHA : "sex" was added by a 1974 amendment, *See* Pub. L. No. 93-383, 808, 88 Stat. 633, 729 (1974); and "familial status" and "handicap" were added by the 1988 Fair Housing Amendments Act, *See* Pub. L. No. 100-430, 102 Stat. 1619 (1988). As noted by Schwemm and Allen, *supra* note 45, at 145, discrimination on the ground of age is not covered by the FHA.

⁴⁸ 42 U.S.C. § 3604(a) (1994). 42 U.S.C. §3604(f) adds comparable bans with regard to discrimination of handicaps.

represent a prototype of the commercial contract. However, it is important to emphasize that numerous contracts for the sale or rent of real estate properties are *not* subject to the FHA.⁴⁹ The best known exemption from the prohibition of discrimination is the one named after the imaginary Mrs. Murphy. Since this exemption limits the prohibition of discrimination under both Title II and the FHA and sheds light on the controversy around the discriminatory refusal to contract, a more careful investigation of it follows.

D. Mrs. Murphy's Exemption

The origins of the Mrs. Murphy exemption are to be found in the early 1960s when legislators and laypeople argued about the justification and scope of what later became Title II – the outlawing of discrimination in places of “public accommodation”. Back then Mrs. Murphy served as a representation of the “victim of the victims”: a poor widow who barely makes a living by renting rooms in her modest home and who would collapse – either financially or morally – were she compelled by intrusive laws to make the cruel choice between losing her source of income and living with tenants she finds objectionable. “In the political conservative account, she was the everywoman whose dignity and freedom the state should not deny by saddling her with tenants whom she

⁴⁹ 15 AM JUR 2D, *Civil Rights*, § 381 (“In general, the Fair Housing Act applies to all dwellings. However, although single-family houses sold or rented by the owner are generally covered by the Act, an exemption does exist for such houses sold or rented without the use of the facilities or services of a real-estate agent and without publication of an advertisement violative of 42 U.S.C.A. § 3604(c), as long as the private individual does not own more than three such houses at one time and applies this exemption to only one sale in any 24 month period, if the seller was not the most recent resident of the house. In addition, a religious organization, association or society, or any nonprofit institution or organization operated by or in conjunction with a religious organization, association, or society, may limit the sale, rental or occupancy of dwellings which it owns or operates for other than a commercial purpose to persons of the same religion, or give preference to such persons, unless membership in the religion is restricted on account of race, color, or national origin. Private clubs that are not open to the public, which as an incident to its primary purpose or purposes provides lodgings which it owns or operates for other than a commercial purpose, also may limit the rental or occupancy of such lodgings to its members, or may give preference to its members. Finally, nothing in the Fair Housing Act limits the applicability of any reasonable laws regarding the maximum number of occupants permitted to occupy a dwelling. The familial status rules of the Act do not apply to housing for older persons.”)

would not choose as friends.”⁵⁰ The image of Mrs. Murphy as a victim of antidiscrimination rules that interfere in the private market was so powerful that it led to the exclusion of small dwellings from the definition of “public accommodation”.⁵¹ Several years later, in 1968, an analogous exemption was added on behalf of the same Mrs. Murphy to the banning of discrimination in the “fair-housing” context.⁵²

Although thinking about a particular, albeit theoretical, woman may help in problematizing the issue at hand, several scholars pointed to the racist aspects of the very use of a “Mrs. Murphy”.⁵³ The vulnerable persona attached to Mrs. Murphy distracts us from asking *why* does she find some potential tenants to be so objectionable? Why would having them around (allegedly) be so devastating an experience that it might drive her to give up her income? The criticism can become clearer by replacing Mrs. Murphy with an alternative and perhaps more typical landowner. Consider, for instance, Mr. Archie Bunker – a cheap retired man who rents his place coldheartedly to whomever is willing to pay him more but who also strongly detests African-Americans. It is doubtful that such an “Archie image” could have convinced ambivalent people to support the restriction of civil rights by norms of freedom of contract.

⁵⁰ Marie A. Failinger, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U.L. REV. 383 (2001).

⁵¹ § 2000a(b)(1) exempts boardinghouses containing five or fewer rooms for rent if the owner resides in the house. See 42 U.S.C. § 2000a(b)(1) (1994).

⁵² While the inclusion of the exemption in Title II was pursuant to much debate, the reproduction of the exemption in the housing context was less discussed. See, e.g., James D. Walsh, *Reaching Mrs. Murphy: A Call for Repeal of the Mrs. Murphy Exemption to the Fair Housing Act*, 34 Harv. C.R.-C.L. L. Rev. 605, 608 (1999).

⁵³ Sam Stonefield, *Non-Determinative Discrimination, Mixed Motives, and the Inner Boundary of Discrimination Law*, 35 BUFF. L. REV. 85, 101 (1986). (“within the area specified by the exemption, ‘Mrs. Murphy’ can express herself by indulging her racist tastes, if any, and societal support for her freedom to discriminate trumps the conflicting personal and societal interests in prohibiting discrimination.”)

E. Summary: Efforts and Hurdles

Legal awareness of problems of discrimination in the market has reached unprecedented levels during the last half century – from almost nothing to a burst of new legislation accompanied by novel judicial decisions that gave effect to older ineffective legislation. The legal system both followed and led society, in a quest for more equality. Although much can be debated with regard to the practical results of this trend and the hurdles in defending equality, such a debate goes beyond the present contractual focus.

In brief and rough sketches, however, it is worth mentioning that the levels of proof that the victims must meet, mainly the requirement to prove the discriminatory *intention* of the defendant, present a primary difficulty while illustrating how antidiscrimination laws tend to reflect “the perpetrator perspective”.⁵⁴ Additionally, the complicated legislative structure is not only confusing, it also leaves uncovered spaces.⁵⁵ A lacuna which is particularly interesting for our purposes - and which can later add practical justification to this Article’s proposition - appears during the contractual negotiations in the retail market. On top of the fact that stores are usually not covered under Title II,⁵⁶ a myopic definition has been given under section 1981 to the process of “making a contract”, according to which the entire shopping experience is narrowed

⁵⁴ See, e.g., Matt Graves, *Purchasing While Black: How Courts Condone Discrimination in the Marketplace*, 7 MICH. J. RACE & L. 159 (2001) (maintaining that “through heightened pleading requirements courts have made it nearly impossible to seek remedy under the very federal civil rights laws that are supposed to guard against discrimination in the marketplace, *id.* 160-161). See also, Alan David Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

⁵⁵ See, e.g., AYRES, *supra* note 18, at 3 (Stating that “The civil rights laws of the 1960s focused on only a handful of nonretail markets – chiefly concerning employment, housing, and public accommodation services. Indeed, the most gaping hole in our civil rights law concerns retail gender discrimination.”)

⁵⁶ See, *supra* note 41

down to the sudden moment of exchange.⁵⁷ As a result, for example, if racial harassment by security guards had occurred in the store and deterred the victims from making a transaction, no remedy is available.⁵⁸ The problems become even more severe when combined with procedural barriers such as the need to exhaust administrative steps before suing and to bring an action within a shortened limitation period. And if this is not enough then many times victims also face judges and jurors who find their stories unbelievable or paranoid and accept various excuses too easily.⁵⁹

However, even though the antidiscrimination legislation is taxing and equality is still far from accomplished - there can be no doubt as to the intensity of the effort that has been made and about the high priority that has been given to the issue of discrimination. However, as I will immediately attempt to illustrate, this was not even remotely the case as far as contract doctrine is concerned.

II. The Sound of Silence: How Contract Doctrine Treats the Problem

Private law scholars and contract law theorists rarely enter the civil rights arena discussed above, and seldom participate in the constitutional discourse regarding persistent inequalities in our society. The exposition of this neglect and the ways it manifests itself, as well as a documentation of the few rare exceptions, is undertaken in the following four sections.

⁵⁷ See, e.g., Amanda G. Main, *Racial Profiling in Places of Public Accommodation: Theories of Recovery and Relief*, 39 BRANDEIS L.J. 289, 307 (describing “the narrow window for a viable claim under” §1981).

⁵⁸ A good example is the case of *Morris v. Office Max Inc.* 89 F.3d 411(7th Cir. 1996) - a highly influential §1981 retail case (rejecting a plaintiff’s § 1981 claim asserting that a merchant interfered with his prospective contractual relations”).

⁵⁹ See, e.g., Sheila Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUSTON LAW REVIEW (forthcoming, 2005) (Illustrating how the same cognitive biases that give rise to discrimination in the society can also distort causal judgments about that discrimination.)

A. Ignoring the Problem Altogether

The most common way in which contract doctrine deals with the problem of discrimination is by not dealing with it at all. When Judge Posner faced a contractual claim raised by an African-American who tried to argue that his employment contract included an obligation of equal treatment, his response was chilling:

“If what McKnight is trying to argue is that public policy reads into every such contract a contractual duty not to discriminate on racial grounds, this would imply that every victim of racial discrimination in employment has a claim for breach of contracts as well as a claim under the statutes forbidding such discrimination.

That would be extravagant...”⁶⁰

Evidently the idea that someone might have a *contractual* right not to be discriminated against took Judge Posner by surprise and he was not willing to give it a try. If this quote were taken as representative, one could conclude that the issue of discrimination has nothing to do with contractual standards. Is it possible to find a more explicit unwillingness to admit the contractual nature of the problem of discrimination?

As a matter of method, describing emptiness, silence or omission within a theory is a very difficult task.⁶¹ The first step might naturally be at the legislative level and indeed after exploring Article II of the Uniform Commercial Code it becomes clear that the entire issue of discrimination is absent from its text.⁶² A search for reference to discrimination in the *Restatement (second) of Contracts*⁶³ again yields zero results.

⁶⁰ McKnight v. General Motors Corp., 908 F.2d 104, 112 (7th Cir. 1990).

⁶¹ The problem is especially severe regarding the American law of contracts due to two main characteristics: (a) the absence of a legislated code of contracts, as opposed to many legal systems that are civil by origin or influenced by civil systems; and (b) the presence of a federal system of law that includes states' authority to legislate and which in turn makes it less precise to talk about a single contract doctrine. Without derogating from these difficulties, the fact that scholars do explore some sort of general American law of contracts and routinely write about the theories that shape it, ratifies the attempt to do so by looking at secondary sources.

⁶² *Uniform Commercial Code* (U.C.C.), Article II. While explicitly regulating only the sale of goods, this article of the U.C.C. has always had a strong influence on the common law of contracts. When compared to

Trying to further document the sound of silence, albeit somewhat arbitrarily, I undertook a simple experiment based on what law students learn about the law of contracts. I examined fifteen popular contracts casebooks, on the assumption that they wield an early and particularly powerful influence on the contractual understanding of generations of lawyers and scholars.⁶⁴ With the help of these books' detailed indices I researched how they speak of discrimination in the contractual context. Remarkably, only one of the books had a primary entry for the term "discrimination". Again, it is difficult to measure the intensity of silence, but to appreciate the lack of any entry for such a significant term one should consider the fact that all these books have an extremely detailed index with a rich variety of entries that go far beyond the traditional contractual vocabulary, including contemporary terms such as "surrogate parenting", "internet", "poems" and so on. The vast majority of the books – eleven out of the fourteen, including

"classical" contract law it is considered to be more "holistic" in its approach and it incorporates community norms much more directly.

⁶³ RESTATEMENT (SECOND) OF CONTRACTS. This highly influential source by the prestigious American Law Institute might be taken not only as a set of descriptions and refinements of the contractual common law – a reduction of judicial decisions to rule-like form – but also as an attempt to explain all of current contract doctrine accompanied by some efforts to reform it.

⁶⁴ And the books are: BRIAN A. BLUM, AMY C. BUSHAW, *CONTRACTS : CASES, DISCUSSION, AND PROBLEMS* (2003); JOHN D. CALAMARI, JOSEPH M. PERILLO, HELEN H. BENDER, *CASES AND PROBLEMS ON CONTRACTS* (2000); JOHN P. DAWSON, WILLIAM BURNETT HARVEY, STANLEY D. HENDERSON, *CONTRACTS: CASES AND COMMENT* (2003); DAVID G. EPSTEIN, BRUCE A. MARKELL, LAWRENCE PONOROFF, *MAKING AND DOING DEALS: CONTRACTS IN CONTEXT* (2002); LON L. FULLER, MELVIN ARON EISENBERG, *BASIC CONTRACT LAW* (2001); E. ALLAN FARNSWORTH, WILLIAM F. YOUNG, CAROL SANGER, *CASES AND MATERIALS* (2001); AMY HILSMAN KASTELY, DEBORAH WAIRE POST, SHARON KANG HOM, *CONTRACTING LAW* (1996); CHARLES L. KNAPP, NATHAN M. CRYSTAL, HARRY G. PRINCE, *PROBLEMS IN CONTRACT LAW: CASES AND MATERIALS* (2003); STEWART MACAULAY, JOHN KIDWELL, WILLIAM WHITFORD, *CONTRACTS : LAW IN ACTION: THE CONCISE COURSE* (2003); WILLIAM MCGOVERN, LARRY LAWRENCE, BRYAN D. HULL, *CONTRACTS AND SALES: CONTEMPORARY CASES AND PROBLEMS* (2002); EDWARD J. MURPHY, RICHARD E. SPEIDEL, IAN ARYES, *STUDIES IN CONTRACT LAW* (2003); JOHN EDWARD MURRAY, JR., *CONTRACTS: CASES AND MATERIALS* (2001); ROBERT E. SCOTT, JODY S. KRAUS, *CONTRACT LAW AND THEORY* (2002); ROBERT S. SUMMERS, ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* (2001).

casebooks generally known to be quite sensitive to social concerns⁶⁵ – choose to remain totally silent.

In an attempt to prove the general rule of unawareness through its exception, it is important to note that the only book that indexed the expressions of “Racial Discrimination” and “Gender Discrimination” as main entries is *Problems in Contract Law* by Knapp, Crystal & Prince.⁶⁶ Offering less than a page of condensed discussion of these two issues together,⁶⁷ this is the only book to even raise the question of whether there is room for separate contractual treatment of the problem of discrimination on the basis of race, ethnicity, sexual orientation or disability.⁶⁸ And yet, the question is introduced with regard to performing an already existing contract and overlooks the issue of refusal to even enter contractual relationship.⁶⁹

⁶⁵ A good example is the excellent “LAW IN ACTION” casebook which has a special entry for “poverty” and that deals with the known *Walker-Thomas* case [Williams v. Walker-Thomas Furniture Co. 350 F.2d 445 (D.C. Cir. 1965)] under the title “the poor go shopping” in the section called “retailing and the poor”, ignoring the case’s racist load. See Law in Action, *id.* at 520-521. To the racist load of this case see Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 305-310 (1994). As Prof. Kastely points out, Williams’ (black) race was not even mentioned by Judge Wright who offered her relief, let alone the heavily racist barriers and burdens that even after the Civil Rights Act of 1964 “continue to affect the lives and commercial choices of black people in the District of Columbia.”

⁶⁶ See PROBLEMS IN CONTRACT LAW, *supra* note 64. The other two books which do mention the problem (without indexing it) do so briefly and in the context of other contractual issues. In STUDIES IN CONTRACT LAW a short paragraph mentions 42 U.S.C. § 1981 as possible grounds for illegality, see STUDIES IN CONTRACT LAW, *supra* note 64, at 586. In CONTRACTING LAW, the same statute is mentioned in the context of punitive damages (“punitive damages may be awarded for violation of the Civil Rights Acts of 42 U.S.C. §§ 1981, 1982, and 1983, upon finding that the defendant’s conduct was motivated by malicious intent, or when it involved reckless or callous indifference to the rights of others”), see CONTRACTING LAW, *supra* note 64, at 1048.

⁶⁷ See PROBLEMS IN CONTRACT LAW, *id.* at 454.

⁶⁸ It does so by reference to Neil Williams’ article which is discussed below, see *infra* note 83.

⁶⁹ In CONTRACTING LAW, *supra* note 64, which is written with great social sensitivity and rare racial awareness, one can read about Patricia Williams’ following experience: “I grew up in a neighborhood where landlords would not sign leases with their poor, black tenants...” but there is no further discussion of this pre-contractual problem (the authors’ use of Williams’ story is aimed at the limits of the objective theory as applied to contract formation), see *Id.* at 159 (quoting Patricia Williams, *Alchemical Note :Reconstructing Ideals from Deconstructed Rights* 22 Harv. C.R.-C.L. L. Rev. 401 (1987)).

B. Marginalizing the Problem

Marginalizing the problem is both similar and different from ignoring it altogether. It is similar in its denial of the issue at hand, which is still perceived as not worthy of a contractual response. It is different in that it is slightly louder than absolute silence. When marginalizing, proponents are more vocal, they say things that one can later hear and challenge. For instance, they might say “that race and gender discrimination is not a serious problem in retail markets”; or that “today few whites are out-and-out racists.”⁷⁰; or that “people don’t need affirmative action to trade with blacks.”⁷¹ The tendency to downplay the harm of discriminatory contractual behavior is a common response to the problem, especially among economists and scholars who can be described as “market-oriented”.⁷²

C. Anti-Antidiscrimination: The Problem will Solve Itself

Some scholars have argued that to the extent that discrimination exists, the marketplace is efficient enough to deal with it and ultimately solve it.⁷³ This hopeful view can be seen not only as overly optimistic,⁷⁴ but also as hiding a harsher idea that is truly resistant to laws that aim to forbid discrimination via interference with the “free market”. Saying that the free market will take care of discrimination becomes a pretext for

⁷⁰ STEPHAN THERNSTROM & ABIGAIL THERNSTROM, *AMERICA IN BLACK AND WHITE: ONE NATION, INDIVISIBLE* 530-531(1997).

⁷¹ *Id.* at 450.

⁷² *See, e.g.,* Ayres, *supra* note 18, at 3.

⁷³ *See, e.g.,* CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN: A PERSONAL INTERPRETATION* 82-83 (1997) and THERNSTROM & THERNSTROM, *supra* note 70The thesis that these books share is critically discussed in Richard Delgado, *Rodrigo’s Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 *Nw. U. L. Rev.* 215 (1998). (confronting the contention made by law and economics works that free markets will correct discrimination since there are grounds of human behavior, specifically racist behavior, that are not economic in nature and that set off people to make economically unfavorable decisions).

⁷⁴ Some scholars argued explicitly that the free market cannot cope with discrimination without external help. *See, e.g.,* Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency and Social Change*, 103 *YALE L. J.* 595 (1993); CASS R. SUNSTEIN, *FREE MARKETS & SOCIAL JUSTICE* (1997) Ch. 6: “Why Markets don’t Stop Discrimination?”.

regulation hostility - hostility that is not conditioned on the actual performance of the market. One of the provocative preachers of this idea is Prof. Richard Epstein who argues that anti-discrimination laws create more injustices than they can repair.

Epstein, who describes himself as “unreconstructed defender of *Laissez faire*”,⁷⁵ and who like other strong believers in autonomy theories stresses the right of each individual to choose, argues that “An antidiscrimination law is the antithesis of freedom of contract, a principle that allows all persons to do business with whomever they please for good reason, bad reason or no reason at all...”⁷⁶ Epstein makes his case against the use of civil rights laws in this context. From his point of view the focus on civil *rights* conceals the aspect of the *duties* which have to be imposed on the other end. He writes: “We cannot simply pair human rights to a set of correlative duties on abstract bodies, hoping thereby to externalize their cost on no one in particular.”⁷⁷

Epstein’s arguments illustrate the situation in contrasting colors. For him, equality is too costly and the main problem is that the equation between benefits (decreasing discrimination) and costs (less liberty) is rarely or never done.⁷⁸ Epstein goes on to say: “when the cost elements of a modern human rights statute are allowed to enter into any equation, they are never placed on the same footing as the rights side.” He then engages himself in what he sees as “a closer comparison” of “the modern statutory rights that guarantee freedom from discrimination with those which allow persons to make contracts

⁷⁵ RICHARD A. EPSTEIN, EQUAL OPPORTUNITY OR MORE OPPORTUNITY? THE GOOD THING ABOUT DISCRIMINATION 36 (2002).

⁷⁶ RICHARD A. EPSTEIN, FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYER DISCRIMINATION LAWS 3 (1992). For a critical review of Epstein’s ideas as presented in this book see George Rutherglen, *Book Review: Abolition in a Different Voice*, 78 VA. L. REV. 1463 (1992).

⁷⁷ EPSTEIN, EQUAL OPPORTUNITY, *supra* note 75, at 4.

⁷⁸ Other than the damage to liberty the cost of the administration of the antidiscrimination law, to quote Epstein, is “hundreds of millions of pounds in foregone economic efficiency...”*Id.* at 16.

to dispose of their labour or property”⁷⁹. These words expose the sort of attitude that is typical to market followers. The right “to make contracts” (Epstein’s words) was promised to blacks under the Thirteenth Amendment, while blacks are also the ones who need most the “freedom from discrimination” (Epstein’s words again). Therefore, the argument quoted above creates unjustified opposition and confrontation between two ideas that were supposed to serve the same purpose. From this alleged opposition emerges the conclusion that “...the anti -discrimination norm is heavily *parasiti* on the basic right to trade and the first should be suppressed by the later.”⁸⁰

Epstein then calls not only for the abolishment of these “parasitic” rules but also for the enactment of a new rule that will explicitly *permit* refusal to contract with a person out of discriminatory tastes. The suggested statute would flagrantly say:

“Every individual and group may refuse to contract or associate with, or to otherwise discriminate for or against any other group or individual for whatever reasons they see fit, including without limitation, race, creed, sex, religion, disability, marital status, or sexual orientation.”⁸¹

Needless to say that not all the market sympathetic scholars agree either with the “Epsteinian” endless trust in the powers of the market or with his aversion to antidiscrimination laws.⁸² However, when dealing with the question of the lack of contractual response to the problem of discrimination, acquaintance with this (loud) line of thinking is apposite, especially if one wishes to call for a more attentive response.

⁷⁹ *Id.* at 5.

⁸⁰ *Id.* at 6.

⁸¹ *Id.* at 11.

⁸² See, e.g., SUNSTEIN, *supra* note 74; Simon Deakin, *Equality, Non-discrimination, and the Labour Market: a Commentary on Richard Epstein’s Critique of Anti-discrimination Laws*, in EPSTEIN, EQUAL OPPORTUNITY, *id.* at 41-56. See also Delgado, *supra* note 73.

D. Summary: Contractual Hush

In his 1994 article Prof. Neil Williams not only takes discrimination seriously and as inherent to the realm of contracts, but he also points critically to the absence of contractual case law on this point.⁸³ He calls attention to the need to use contractual tools and contractual remedies in order to combat discrimination more successfully. Writing exclusively on racial discrimination and focusing on situations in which a contract was already made⁸⁴ - as opposed to the pre-contractual phase discussed in this Article - Williams suggests a common law model for the prohibition of racial discrimination.

Apart from Williams' work and few other exceptional scholars who paid contractual attention to discriminative practices,⁸⁵ it seems that the vast majority of people who influence contract doctrine – legislators, judges, lawyers and scholars – still share the conception that discriminations is not a contractual issue but rather “something else”, completely isolated from contracts' reality.⁸⁶ It is possible to speculate that this conception has a lot to do with the ideological role of contract law in a capitalist society. This hypothesis feeds on the traditional legal structure of the dilemma, which will now be explored.

⁸³ Neil G. Williams, *Offer, Acceptance, and Improper Considerations: A Common-Law Model For the Prohibition of Racial Discrimination in the Contracting Process*, 62 GEO. WASH. L. REV. 183 (1994).

⁸⁴ Williams points to two cases which “provide evidence that some courts, if confronted with the appropriate case, may well be prepared at least to acknowledge that contract law prohibits racial discrimination by parties *who have entered into contracts*.” (emphasis added) *Id.* at 222.

⁸⁵ In his book *The Limits of Freedom of Contract*, Prof. Trebilcock dedicates an entire chapter to this problem, which he sees as “one of the most difficult domestic policy issues now facing many industrialized societies.” See MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 188 (1993). Prof. Ayres' book *Pervasive Prejudice*, which is based on his earlier empirical works, also highlights the commercial sides of the problem although his work is less focused on contractual doctrine. What makes Ayres' work exceptional in comparison to the standard silence is his empirical contribution to our understanding of how intense and pervasive the problem is. See AYRES, *supra* note 18.

⁸⁶ Only recently Prof. Anne-Marrie Harris wrote that “it is unclear that the law will evolve to incorporate a proscription against racial discrimination...” See Anne-Marie Harris, *Shopping While Black: Applying 42 U.S.C. § 1981 to Cases of Consumer Racial Profiling*, 23 B.C. THIRD WORLD L.J. 1, 18-19 (2003).

III. The Traditional Structure of the Dilemma

The divorce of contract law from discrimination issues and the separation between antidiscrimination laws on the one hand and contractual principles on the other is the external layer, the wrapping, of a deeper ideological structure upon which the legal norms are founded. Beneath this external layer several dominant dichotomies are to be found and they will be described now.

A. Private v. Public

The total separation between civil rights and contracts can also be described along the lines of the public/private dichotomy which the law tends to maintain. The discourse of equality, discrimination, racism, social justice and the like remained confined to the public sphere - it did not intrude into the private realm of contracts, market and commerce.

The genesis of this hermetic separation of public from private in the contractual discrimination context lay in the *Civil Rights Cases* of 1883.⁸⁷ Remarkably, each of these five cases evolved from discriminatory (and racist) refusals to contract on the part of *private* people or companies. Each of the cases involved the rejection of a black person from the market: in two cases, admittance to the dress circle in a theater and to an opera house; in two additional cases, accommodation in an inn or hotel; and in the fifth case, access to the ladies' car of the train. Essential to the understanding of the way in which the dilemma was structured is the fact that despite these "private" circumstances – private actors denying the participation of private black people in the private market - the whole legal debate took place on the "public" level.

⁸⁷ 109 U.S. 3 (1883).

First, four of the five cases were *criminal cases* in which the decision to prosecute the discriminators was the focal point. Second, and more importantly, the discussion focused on the *constitutional question* of the power of Congress to legislate the Civil Rights Act of 1875 in light of the Fourteenth Amendment. Finally, it is almost goes without saying that the contractual implications of the cases, such as essential questions of freedom of contract and market functionality, were not even mentioned.

In a decision that was to afford the private sector immunity for the next 85 years from legal suits founded on grounds of discrimination, the Supreme Court struck down the Civil Rights Act of 1875, holding that the Act - because it applied *to private*, not state action - was beyond Congress' Fourteenth Amendment enforcement power. The sad result was, to quote Tsesis, that:

“private business owners who refused to provide blacks with goods and services were now protected by state indifference or outright support for discriminatory practices”⁸⁸

Thirteen years after its *Civil Rights Cases*' decision, the Supreme Court reaffirmed the public classification of the issue of discrimination when it held in *Plessy*⁸⁹ that the rights to make contracts and to own property are only protected against state action but not against discrimination by private people. The narrow interpretation of *Plessy* limited the scope of the Thirteenth Amendment and the Civil Rights Act of 1866 in a manner similar to that taken by the court in the *Civil Rights Cases*' holding that had limited the scope of the Civil Rights Act of 1875. This restrictive interpretation had two prongs: first, and most pragmatically, equality was to be enforced only against public

⁸⁸ Tsesis, *supra* note 24, at 337.

⁸⁹ See *Plessy*, *supra* note 32.

discriminators; and second, and more theoretically, discrimination was perceived as a public problem.

The first aspect, the refusal to impose nondiscriminatory behavior on private people, stood for many decades until it was overturned in 1968, when the Supreme Court published its *Jones* decision.⁹⁰ For the first time the Court made it clear that private people *were* subject to the legal orders of non-discrimination. The public/private dichotomy regarding who was doing the discriminating was eliminated, and an undivided legal space created within which discrimination was forbidden irrespective of the discriminators' characteristics. On the other hand - and in sharp contrast to this achievement - in terms of the second aspect of *Plessy* referred to above – to this day there has still been no change and, as I argue here, discrimination continues to be perceived as a *public problem*, rather than a private one.⁹¹

What makes the patchwork of civil right statutes discussed above appear as a “public” issue? First, it is in the name. All of those Civil Rights Acts are codified under Title 42 of the U.S.C. – a title significantly entitled “*The Public Health and Welfare*”. Second, as a more nuanced look will demonstrate, the goal of Title II was and still is to defeat discrimination in the public arena, which in the legal jargon is defined, most meaningfully, as “places of *public* accommodation”. The focus of antidiscrimination statutes such as Title II on “public” accommodation reflects the fact that the discrimination they try to overcome is perceived as a public problem which happens in a

⁹⁰ See *infra* notes 32 to 39 and accompanying text.

⁹¹ See, e.g., Paul Schiff Berman, *Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation*, 71 U. COLO. L. REV. 1263, 1268 (2000) (stating that "most Americans are likely to resist, on an intuitive level, scholarly attempts to erode the distinction between *public and private*") (emphasis added). Note that to the extent that the Fourteenth Amendment has been interpreted to protect the rights of discriminated groups its cover is still restricted to the “public” sphere and is actionable only against “public” discriminators.

public space.⁹² Third, the civil rights laws are categorized as belonging to the core of what is often called “public law” as they are taken to address public policy concerns.

With all these public features combined, the patchwork of antidiscrimination rules was completely detached from contract law, from the shrine of “private law”. The public problem of discrimination was and still is covered by public norms: these public norms and the private rules of the market are currently like parallel lines destined never to meet.

B. Economic v. Social

While the market is an economic feature upon which the whole existence of modern economy is dependant, the phenomenon of discrimination is for the most part a social one and the battle against it is conceptualized as a social goal.⁹³ Because traditional contract doctrine is often accepted as the representation of the free-market ideology,⁹⁴ the distinction between economic considerations and social concerns is particularly typical to contract law. Especially when analyzed by law and economics scholars, contract law seems to have a natural connection to economic concerns and a similar degree of alienation from social ideas. The same is true of another dichotomy –between efficiency and fairness: contract law is supposed to be efficient, while the attempt to secure equality is an issue of fairness.

⁹² Title II is the main but not the only statute in which the concept of “public accommodation” plays a major role. See, e.g., the ADA, *supra* note 21. As explained by Prof. King “The meaning of two terms, ‘public accommodation’ and ‘place of public accommodation,’ are key to determining the coverage of Title III.” See King, *supra* note 21, at the text accompanying footnote number 6.

⁹³ See, e.g., Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction* 100 Yale L.J. 1329 (1991). Arguing for the need to prohibit discrimination that is based on foreign accent Prof. Matsuda tells the story of Mr. Fragante who despite his fine education was turned down for the job of clerk in the Division of Motor Vehicles because of his Filipino accent. Vis-à-vis the economic/social dichotomy she says: “his story ends in Title VII litigation, not in the triumphant recognition of his talents by the free market.” *Id.* at 1334.

⁹⁴ See, e.g., Peter Gabel & Jay Fineman, *Contract Law as Ideology*, in *THE POLITICS OF LAW* 496 (David Kairys, ed., third edition, 1998).

Truly, the *Lochner* days are gone⁹⁵ and expansive critical work has been done to add social sensitivity to the old *laissez faire* contractual principles. However, inasmuch as we are dealing with the structure of things, it is economic activity and not social goals that lie at the core of contract law. This economic/social division is of course strongly linked to the separation of private and public areas of law discussed above, but it still is worthy of special emphasis. After all, one of the provocative arguments made against antidiscrimination laws is based exactly on the economic quality of contract law and the social nature of discrimination: as we saw earlier, according to Prof. Epstein's argument, interrupting the economic function of the market by imposing prohibitions of discrimination based on social motives results in severe economic losses which, in turn, justify the abolition of such prohibitions.

C. White v. Black

By saying earlier that this Article is *not* restricted to discrimination on the grounds of race I did not mean to underestimate the severity of racial discrimination, particularly that of blacks, in this context. As many have shown, African-Americans are by far the most discriminated group in the market.⁹⁶ More specifically, as the *Staples Case* may suggest, they more than any "Others" - such as the disabled or elderly⁹⁷ - suffer from the

⁹⁵ *Lochner v. New York*, 198 U.S. 45 (1905).

⁹⁶ See, e.g., Graves, *supra* note 54; Regina Austin, "A Nation of Thieves": Securing Black People's Right to Shop and to Sell in White America, 1994 UTAH L. REV. 147, 149-150.; see also W. Sherman Rogers, *The Black Quest for Economic Liberty: Legal, Historical, and Related Considerations*, 48 HOW. L.J. 1, (2004) (exploring the reasons for the poor economic situation of blacks in America.) According to this article: "Black individuals, when compared to their white counterparts, experience twice the rate of unemployment, have substantially lower personal and family income, are three times more likely to live in poverty, and possess only one-fifth of the net worth of whites." See *id.* at 10 (footnotes omitted).

⁹⁷ Naturally, a combination of several kinds of "otherness" is the worst - for instance trying to contract as a black elderly handicapped woman.

problem of refusal to contract. For example, in a recent article Prof. Harris described the experience of what she called “Shopping While Black”:⁹⁸

“White Americans are largely unaware of their privileged status in the marketplace. Most of the time, white consumers can run errands, shop, dine out, and take in a show with the expectation of at least minimally appropriate service in the establishments where they spend their money. However, African-American consumers' patronage and money are somehow regarded as less valuable than that of the white consumer. In fact, "shopping while black" involves some of the same risks associated with the better-known phenomenon of "driving while black." Shoppers of color are viewed with suspicion and, as a result, they are more likely to be watched, followed, harassed, and even denied service in the course of their daily roles as consumers.”⁹⁹

This racial dimension of the problem is especially significant in light of the particular background of sections 1981 and 1982, that were meant to assure that “a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man.”¹⁰⁰ Recalling the allegations against the racist motives of Mrs. Murphy,¹⁰¹ one can get the picture and it is indeed a very gloomy one: while the marketplace is predominantly white, the discrimination therein is mainly directed against blacks.

D. Summary: Multilayered Segregation

As we have just seen, the division between contract law and the problem of discrimination is multilayered. Each of the dichotomies discussed above in itself creates a

⁹⁸ Harris, *supra* note 86.

⁹⁹ *Id.* at 2.

¹⁰⁰ Jones, *supra* note 16 at 443. (“Negro citizens, North and South, who saw in the Thirteenth Amendment a promise of freedom -- freedom to "go and come at pleasure" and to "buy and sell when they please" -- would be left with "a mere paper guarantee" if Congress were powerless to assure that a dollar in the hands of a Negro will purchase the same thing as a dollar in the hands of a white man. At the very least, the freedom that Congress is empowered to secure under the Thirteenth Amendment includes the freedom to buy whatever a white man can buy, the right to live wherever a white man can live. If Congress cannot say that being a free man means at least this much, then the Thirteenth Amendment made a promise the Nation cannot keep.”)

¹⁰¹ As discussed *supra* in Part I.D.

division between contracts doctrine and issues of discrimination; collectively, each reinforces the others, cumulatively creating a virtual abyss between the two. On one side of this abyss is the realm of the market with its contractual rules, private nature, economic orientation and white dominancy. On the other side lies the realm of discrimination with its civil rights statutes, public disposition, social inclination and a majority of black victims. The gap is deeper and more systematic and hermetic than might seem at first glance. As I will now argue, it is so profound that a bridging mechanism is necessary to connect what has been detached for too long; or, in more allegorical terms - to end the segregation.

IV. Reconstruction of the Dilemma

Intuitively, and somewhat post-modernly, if the problem is a deep and multilayered segregation between the contractual and the constitutional universe - then the solution should be sought under the lamppost of connection and integration. Before doing so, however, it is essential that we explore the kinds of harm caused by the current separation and examine the warnings that lie therein. Coming next, therefore, is an examination of the incentives for reconstruction, followed by a new model for integration.

A. The Logic: The Harm of External Treatment

The purpose of this section is not to echo and track the important works that explore the many flaws of the current web of antidiscrimination laws.¹⁰² Presumably,

¹⁰² See, e.g., Graves, *supra* note 54; see also Claudine Columbers, Targeting Retail Discrimination with Parens Patriae, 36 COLUM. J.L. & SOC. PROBS. 209, 213-217 (2003); Deseriee A. Kennedy, *Consumer Discrimination: The Limitations of Federal Civil Rights Protection*, 66 MO. L. REV. 275 (2001).

these laws are functioning and do offer certain, probably less than sufficient, remedies.¹⁰³

The focus here is on the ills caused by the severance of contract law from discrimination, in and of itself. For at least three reasons this lack of contractual attention - so typical to the traditional structure under which discrimination is classified exclusively as a civil rights issue - is extremely disturbing.

1. Locking the Outsiders Out

The typical situation is the following: two people enter the marketplace with a contract in mind, be it a quick retail exchange or a long-term rental transaction, but one of them refuses to contract with the other for reasons of discriminatory “taste”. This refusal hurts the other, who becomes an outsider unable to conduct business in the market. Remarkably, under traditional analysis the law essentially tells the outsiders to stay outside and to cope with their rejection from there— from outside of the marketplace, the realm of private ordering, where free individuals execute their autonomy and choices. The law offers a mechanism of civil rights that places the victims in an arena which is completely isolated from the one they were trying to enter.

Although both potential-parties were trying to make a contract and were involved in a classic contractual ritual of negotiation,¹⁰⁴ the law’s response eradicates the contractual meaning by channeling the predicament to public canals. By doing so the law actively perpetuates the most significant part of the problem – the creation of

¹⁰³ For a recent encouraging research see Raphael W. Bostic, “Have Anti-Discrimination Housing Laws Worked? Evidence from Trends in Black Homeownership” *JOURNAL OF REAL ESTATE FINANCE AND ECONOMICS*, (Forthcoming 2005) (studying homeownership patterns of black and non-black households during the 1970s, 1980s, and 1990s using Census data and data that proxies for the level of enforcement of the Fair Housing Act over time and finding a consistent positive relationship between fair housing policy enforcement and black homeownership growth.)

¹⁰⁴ Many times, especially in the retail context, the negotiation process can be very short or even unnoticeable. However, it is still a common social and legal ritual that normally carries contractual meaning(s).

disempowered outsiders. In other words, the people who are rejected from the market are not offered market tools that will enable them to protest and resist *from within*. Instead, they are directed to an external arena, well-separated from the market, and only from that distance are they allowed to knock on the gates of the market and beg for entry.

From a contractual perspective, the people who suffer from discrimination are not only left *outside*, they are also marginalized: despite their contractual aspirations and the contractual situation - they own no contractual claim, which suggests that they had no contractual right to begin with. Compared to other parties who were rejected during the negotiation process for other, non-discriminatory reasons, they are in an inferior position, forced to use only non-contractual legal tools.

2. The Harm to the Individual Self

Shifting the legal claim from the contractual arena to the civil rights field transforms its nature. In the civil rights realm, in order to enjoy civil rights' remedies, the law requires that the victims define themselves as part of a certain pre-recognized deprived group and prove they truly belong to such a group.¹⁰⁵ Here another paradox surfaces: the victims were trying to privately and independently exercise their individual-economic selves; the law, however, compels them to translate their failed self-invention into a collective language and to use arguments of group-inferiority and systematic-victimhood. They sought to achieve ordinariness – say by dining or shopping – and discriminatory treatment deprived them of the freedom to be ordinary; now the law joins

¹⁰⁵ Focusing on §1981 retail cases most courts seem to adopt the *McDonnell Douglas* framework [McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973)]. Within this framework they use one of the few versions of the *prima facie* test. The most popular version seems to be set in *Morris v. Office Max, Inc* 89 F.3d 411 (7th Cir. 1996) which, on its first level, requires the plaintiff to show that he or she is a member of a racial minority.

in and labels the situation as something extraordinary – as not a contractual refusal to deal but a civil rights infringement.

In a liberal-western-capitalist society such as American society, this inability to be an autonomous agent who enjoys basic individualistic freedoms is devastating, and stands in contradiction to the liberal commitment to the idea that individual autonomy is vital to the construction of the self. We need to remember that this was the deeper and basic idea of the Thirteenth Amendment – that equality comes not only, and perhaps not even mainly, from participation in rare moments of voting but also from the ability to lead ordinary daily life. When the law’s response to the problem of refusal to contract confines the rejected parties to the world of civil rights, it also constrains them to the world of group-oriented victims - forcing them to give up their freedom to invent and revise their ends through reliance on their own agency and on their ability to constitute themselves. In this sense the law can be seen as exacerbating the problem of inability to fulfill one’s individual self more than helping to resolve it.

3. The Boomerang Effect

The outsiders who might lose their individual voice are one side of the coin. On the flipside of the coin are the discriminators. Here the paradox of external vs. internal returns in a different form, in a way that may echo critical responses toward affirmative action.¹⁰⁶ The discriminating party comes to the marketplace seeking to do private business and ends up being sued for infringement of the civil rights of a member of a

¹⁰⁶ See, e.g., Eric J. Mitnick, *Three Models of Group-Differentiated Rights* 35 COLUM. HUMAN RIGHTS L. REV. 215, 218, 246-247 (2004) (generally suggesting that “there may be a further, largely unrecognized, moral cost associated with group-differentiated rights.” And, more specifically - when writing about affirmative action - emphasizing: “the notion that affirmative action programs may exacerbate already dangerous social stigmas is increasingly acknowledged as a potential moral harm by proponents and detractors of preferential policies alike.” Mitnick adds that “this concern led Supreme Court Justice Clarence Thomas in one case to claim that such ‘programs stamp minorities with a badge of inferiority’, and in another that ‘because of this policy all [blacks] are tarred as undeserving.’”).

protected minority group. Furthermore, the discriminator may face severe punishment, far beyond the scale of the specific transaction that the discriminator entered the marketplace for, since the punishment takes into account the broad effects of discrimination on the victim's entire group.

Without in any way justifying discrimination, it is clear that from the discriminators' perspective this legal reaction might seem exaggerated and unfair. For merely exercising their fundamental freedom of contract in a specific private transaction they are treated and punished as immoral persons, and pay "tax" for centuries of social injustice that they most likely do not see themselves responsible for in any way. This feeling of lack of proportionality might later translate into a greater anger and resistance directed not only at the specific plaintiff, but also at the rest of his group. Since the plaintiff was forced – because of the contract/discrimination dichotomy - to resort to collective norms of attack, the defense might also be group-based and it might reinforce those beliefs that triggered the discriminatory refusal to contract to begin with. Unsympathetic (and indefensible) responses, with which we are all familiar, such as "they are all whiners" or "why won't they work harder instead of complaining" might follow.¹⁰⁷

The fact that the prohibition of discrimination is external, and is not implemented deeply in the contractual field, plays a major role here: the discriminators can easily (albeit not legitimately) point a blaming finger at their victims instead of dealing with the

¹⁰⁷ Responses of this kind were heard, for example, when the enactment of the Fair Housing Act was considered. *See* 114 CONG. REC. S3135 (daily ed. Feb. 15, 1968) (remarks of Sen. Ellender, who claimed that with the Fair Housing Act: "... All personal rights and liberties of the individual are ripped away for the alleged purpose of preventing discrimination. ... If this amendment becomes law, those guaranteed rights will be nothing but lies and dead concepts *Equality is the last refuge of the trifling, the shiftless and the incompetent.*") (quoted by Failinger, *supra* note 50, at 385 n. 13, emphasis added).

morality of their own business behavior. After all, as long as the legal structure remains segregated, the entire issue appears to have little to do with business ethics.

4. Summary: The Need for Reconstruction

If sustaining the traditional structure of different spheres is indeed destructive to the goal of eliminating market discrimination, then clearly the challenge is to find a way to bridge the abyss between the contractual discourse and the civil rights/constitutional discourse. We could think of a legal system that freely fuses the “private” and the “public” discourses and accordingly allows a prolific discussion regarding the rights of the discriminators on the one hand versus those of the victims on the other hand.¹⁰⁸ However, despite calls to do so,¹⁰⁹ it seems doubtful that such a blurring of spheres could take place in the near future under American jurisprudence.

As long as the legal system continues to examine discriminatory business behavior in terms of the contractual liberties of the discriminating party versus the civil rights of the discriminated party, these separate discourses will continue to talk past each other. Therefore, the important and urgent undertaking is to enable a more productive discourse. As I will immediately maintain, such a discourse is possible even under the current closed categories of contract law and constitutional law.¹¹⁰ What follows is a

¹⁰⁸ See, e.g., Aharon Barak, *Constitutional Human Rights and Private Law*, in FREEDOM OF CONTRACT AND CONSTITUTIONAL LAW, *supra* note 2, at 105 – 168 (illustrating the legal public/private distinction, proposing different models for transfusion, presenting the Israeli version of combining the spheres and offering an expansive comparative discussion of similar approaches in different legal systems).

¹⁰⁹ See, e.g., Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585-586 (1933). In this seminal article Professor Cohen established the realist view that contract law is in reality a segment of public law. See also Study Group on Social Justice in European Private Law, *Social Justice in European Contract Law: a Manifesto*, 10 EUROPEAN LAW JOURNAL 653, 668 (2004) (“It is wrong to suppose that there is a sharp separation between the public sphere of constitutional rights and the private sphere of market relations.”).

¹¹⁰ An alternative that goes beyond the scope of this Article is to try to construct a *constitutional model* that would incorporate into the same discourse both the interests of the discriminators and those of the discriminated. Such a model might be built along the lines of basing the discriminators’ claims in the Fourteenth Amendment while founding the counter-claims of the discriminated people on the Thirteenth

contractual model that seeks to bring together, to put on the same page, the discriminators' liberties and the victims' rights. Again, my main purpose in suggesting this model is to create a shared language that can be used to discuss the issue constructively.

B. A Contractual Model: A Myriad of Freedoms of Contract

Often when people talk about the freedom of contract they refer to some abstract notion of uninterrupted business activity, roughly akin to the concept of *Laissez faire*. However, freedom in the contractual world has, or at least should have, much more complex and nuanced meanings. In fact, what is known as “freedom OF contract” embodies several conflicting freedoms that are often confused and that need to be carefully separated and defined.

For the purposes of this Article, untying the bundle of freedoms is crucial in order to facilitate careful exploration of their interplay. It is important to look beyond the powerful identification, reflected in the law, of freedom of contract with the idea of free business activity - and to examine how this common image has obscured other freedoms.

Amendment. As things seem to be positioned today the constitutional discourse tends to be ineffective since the Fourteenth Amendment is perceived ambiguously as defending – in an indecisive manner – both the discriminators' goals and the needs of the discriminated people. Indeed the same Amendment was used in one instance to strike down the Civil Rights Act of 1875 on behalf of the rights of the discriminators to have “freedom of contract” and at other times to protect *from* discrimination under a loose definition of “due process”. On the other hand, the Thirteenth Amendment that appears to be apposite for defending the discriminated people is marginalized as a piece of anachronistic history which is no longer relevant. For a perception of the Fourteenth Amendment as defending the *Lochnerian* ideal of *Laissez Faire* see, for example, Robert C. Post, *The Supreme Court, 2002 Term: Forward: Fashioning the Legal Constitution: Culture, Courts and the Law*, 117 HARV. L. REV. 4 (2003). Prof. Gregory Alexander offers a critical view of the *Lochner* era arguing that contra to the conventional wisdom “Lochnerism neither began with nor defined the *Lochner* era.” See Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 103-118, (F.H. Buckley ed.)(1999). For a very convincing illustration of the large potential of the Thirteenth Amendment followed by a call to revive and expand the ways to use it see Tsesis, *supra* note 24. Notice that Tsesis compares the Thirteenth Amendment with the Fourteenth Amendment while focusing on the question of *what* is protected under each of them while the outline for constitutional model suggested here is centered on the question of *who* (or which group) is protected by each of the Amendments.

Evidently, the prevailing meaning was, historically, the most important for developing the modern market. Contemporarily it is still the appropriate meaning for seasoned players who are already active in the market and who rely on contract law's assistance in keeping their transactions together. However, in order to make room for more meanings and, thereby, for more people who want to play the contractual game, it is important to *destabilize* this governing meaning.

I will now try to outline a more nuanced concept of freedom, one which incorporates three distinct "faces" of freedom in the contractual context: freedom IN contract, freedom FROM contract and freedom TO contract. Tracing each of these - with its own distinct logic - will help to weave a richer fabric of contractual freedom and to afford better understanding of the contractual game vis-à-vis discriminated groups. Terminologically, I will try to avoid the use of "freedom OF contract", which is concerned with the prevailing meaning. When I do use this term it will be to signify the traditional dominant meaning which I believe to be too narrow and excluding.

1. Freedom IN Contract

The freedom of designing the transaction, establishing its terms, choosing the words that accurately describe the deal, and the like, is often described as the "first" contractual freedom.¹¹¹ It is this sense of freedom - which I will call the freedom IN contract - that best correlates with the common use of "freedom OF contract".

The above description of the freedom IN contract emphasizes an active concept of freedom, a Hohfeldian¹¹² human power to choose the set of actions that will better fulfill the party's goals. In political theory terms, as well as philosophically, this is a "positive"

¹¹¹ Omri Ben Shahaar, *SYMPOSIUM: FORWARD: Freedom from Contract*, 2004 WIS. L. REV. 261, 263.

¹¹² For the Hohfeldian study of human rights *see* WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (David Campbell & Philip Thomas, eds., 2001) (1923).

sense of freedom. Yet, emphasizing this active-positive aspect should not veil the “negative” nature of this type of freedom. From this perspective the freedom IN contract is more a freedom from intervention, the freedom to design one’s transaction without constraints imposed by the government or any institution thereof. In fact, the government is even expected to enforce such agreements and its refusal to do so in extreme cases, such as in the case of illegal contracts, is then perceived as intervention.¹¹³ The freedom IN contract can therefore be seen as a mixed freedom – aspects of it are positive but it has an important negative quality which has a significant bearing on the issue of discrimination.

If a legal system outlaws discriminatory refusals to contract it clearly imposes a constraint on one’s freedom to choose *with whom* to do business. Nonetheless, what is essential here is to notice how thin a slice out of the whole loaf of “freedom IN contract” this specific freedom constitutes. As the *Staples Case*¹¹⁴ illustrates, a seller can be constrained from rejecting a black buyer who offers an out-of-state check (if white buyers are not similarly rejected), but the seller still retains almost unlimited freedom regarding every other aspect of the deal.

The realization that the freedom IN contract has the quality of a negative freedom can sharpen our understanding of how narrow is the freedom we jeopardize when prohibiting discriminatory rejections. What is at stake here is significantly narrower: people can freely choose their contractual partners as long as they don’t reject potential

¹¹³ This is indeed the classical view of intervention. Professor Morris Cohen suggested an opposite – realist – analysis according to which any enforcement of a contract by the state is, in fact, an act of intervention. For an elaborate discussion on this point see Eyal Zamir, *The inverted Hierarchy of Contract Interpretation and Supplementation*, 97 COLUM. L. REV. 1710, 1777-1778 (1997) (referring to Cohen’s 1933 article, “The Basis of Contract”, *supra* note 109).

¹¹⁴ *Williams v. Staples*, *supra* note 11.

partners on the grounds of their belonging to groups which have historically suffered from systemic disadvantage or oppression (what Trebilcock calls “historical denial of participation”).¹¹⁵

Furthermore, the weight of this limited restriction needs to be contextualized in order to be appropriately appreciated. Here, in the spirit of relational contracts approach,¹¹⁶ the intensity of the relationship of the parties is the major factor: the more discrete the transaction, the narrower the actual restriction on freedom entailed in forbidding discrimination. For example, if a business like Staples sells millions of printer cartridges to millions of unidentified clients, then the limitation of Staples’ freedom IN contract – if required to contract with a black client – entails inconsequential harm, even before we attempt to weigh it against the harm to the black buyer who was rejected. At the other extreme lie the most relational contracts, such as lifelong two-person partnerships, in which the freedom to choose one’s partner is at the heart of the contract and constitutes a considerable portion of the freedom IN contract. Agreements of this kind are, of course, much rarer than the vast majority of market-transactions.

To sum up, in most cases the freedom IN contract that needs to be taken into account when a contractual antidiscrimination norm is considered is significantly narrower than the cliché of the freedom OF contract.

2. Freedom FROM Contract

In a recent symposium dedicated to the topic of “freedom from contract”, many of the contributors asked themselves “what is freedom from contract?”. The announcement by the symposium defined freedom FROM contract as “the ability of parties to make

¹¹⁵ Trebilcock, *supra* note 85, at 190.

¹¹⁶ See Ian R. Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691 (1974) (the pioneering work which identified the important distinction between discrete and relational transactions.)

legally unenforceable promises” but still left room for many interpretations and definitions.¹¹⁷ This type of freedom, also referred to as the “secondary freedom”,¹¹⁸ can also be described as a negative freedom - especially when we emphasize the “unenforceable” component of the definition. That is, the absence of enforcement marks the boundaries of a realm protected from governmental interference.

Although its underlying negative character, i.e. the right to act uninterruptedly, makes it very well-rooted in traditional liberal thinking, this face of contractual freedom has until recently been much less explored.¹¹⁹ It seems that as long as traditional contractual ideas such as *Laissez faire* ideology and a strict dichotomy between the pre-contractual and the contractual were widely accepted, the freedom FROM contract was taken for granted. This, of course, has much to do with the will theory, since the concept of imposed contract – the antonym of freedom FROM contract – is contradictory to the belief that what legitimizes contractual enforcement is the fact that the obligations are willed by the parties.

The coupling of the freedom FROM contract with the issue of discrimination is clear: it is this kind of freedom which is employed when someone decides to abandon the negotiations *before* they reach the point of contract. It is exactly this strand of freedom that would be threatened if contract doctrine absorbed antidiscrimination norms and banned discriminatory refusal to contract. Thus, in the discrimination context the freedom FROM contract serves the discriminator and not the rejected counterpart.¹²⁰ Similar to the

¹¹⁷ Todd D. Rakoff, *Is Freedom from Contract Necessarily a Libertarian Freedom?*, 2004 WIS. L. REV. 477, 481 (quoting the announcement while maintaining that its text might have many meanings).

¹¹⁸ Ben Shahaar, *supra* note 111, at 263.

¹¹⁹ Rakoff, *supra* note 117, 481.

¹²⁰ Note that contextualizing is crucial in freedom analysis. For example, looking at contractual situations, as opposed to pre-contractual circumstances, it was observed that the freedom FROM contract may benefit weaker parties, such as consumer and employees, from the practical implications of the stronger party's

case of freedom IN contract, here too it is the discriminator's point of view that is reflected in the freedom.

The discriminator's argument in support of his right to discriminate, by rejecting counterparties that do not match his preferences, is entrenched in the will theory. To use Ben Shahar's words: "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." This line of argument may not be convincing, however, to the point of allowing discrimination, since the basic contract was willed by the discriminator who wanted to sell or buy or rent. In such a case the restriction of choice is especially limited, for the discriminator's negative will is based only upon a single trait of the counterparty, such as the counterparty's race or disability. As Ben Shahar persuasively points out: "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."¹²¹

3. Freedom TO Contract

What I now suggest to independently call the "freedom TO contract" is a genus of contractual freedom that is seldom if ever discussed as a stand-alone feature. By saying freedom TO contract I refer to the basic ability of individuals to engage themselves in a contractual relationship, in making a desired transaction, in simply buying, renting, borrowing, being hired or being served.

exercise of its "freedom IN contract" (to use this Article's terminology). In this last context the weaker party's freedom FROM contract means "not to be subjected to contractual limitations to which his or her consent represent at best (in Weber's terminology) the purely formal exercise of formal right." See Rakoff, *supra* note 117, at 493.

¹²¹ Ben Shahar, *supra* note 111, at 267.

Historically, the freedom TO contract was not available to special groups who were perceived as unable to participate in the process of contractual decision-making.¹²² This freedom is so unnoticed, even today, because for too long a time it has been taken for granted. The reason for this seems to be rooted in the perspective of those who define the markets upon which we all rely: business people, economists, jurists, and so on. These dominant players, who are in a manner of speaking the descendants of those who established the modern market, do not have to worry about not being able to participate in it – without them there is no market. For the established participants, the freedom TO contract was, and still is, always available, and therefore, for them, the component of freedom IN contract (usually called the “freedom OF contract”) colors the entire issue of contractual freedom.

The newer recognition of “freedom FROM contract” seems to emerge from the same perspective: it represents the fear of “too much” contract law - a fear of veteran participants in the market. Meaningfully, one of the leading arguments in support of protecting the freedom FROM contract is based on the concern that its absence will deter people from taking part in the market. This clearly assumes that active participation of many is valuable for the functioning of the market, but, again, the very ability of people to do so is considered as a given.

On the other hand, the freedom TO contract cannot be taken for granted by those who are deprived of it. In the same manner it once was a crucially missing freedom for all

¹²² Reva Siegel, “*Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*”, 49 Stan. L. Rev. 1111, 1120 (1997) (Arguing that it was historically understood that economic rights were those exercised by *economic men*, such as those able to own property, enter into contracts and vote – all of which did not realistically include the black man during the relevant era.)

women who lost it upon getting married¹²³ - it is nowadays an essential freedom if one is, for example, a black person who carries a name such as Williams. People like Jesse Williams, who was rejected by Staples,¹²⁴ or Patricia Williams, who was refused by Benetton,¹²⁵ suffer constantly from a lack of freedom TO contract and learn to appreciate the ability to contract.

The well-known story about the different contractual attitudes of Patricia Williams and Peter Gabel can nicely illustrate the point. The two law professors who just moved to Manhattan were comparing their “apartment-renting” experiences. Peter, as a white male with axiomatic freedom TO contract preferred to employ his freedom FROM contract by not signing a formal agreement, while Patricia, as a black woman, took pleasure in her relatively new ability to employ her freedom TO contract. As Williams says:

“Unlike Peter, I am still engaged in a struggle to set up transactions at arms’ length, as legitimately commercial, and to portray myself as a bargainer of separate worth, distinct power, sufficient rights to manipulate commerce, rather than to be manipulated as the object of commerce.”¹²⁶

The less-known part of the story, the piece that did not find way to the *Alchemy of Race and Rights* is that Williams herself, and not only her neighbors, was deprived from her freedom TO contract when the landlady from whom she attempted to rent an apartment in Madison, Wisconsin realized that she was actually black.¹²⁷

¹²³ See, e.g., Hila Keren, Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule with Gender in Mind, AM. U. J. GENDER, SOC. POL’Y & L. (forthcoming 2005).

¹²⁴ As described earlier Jesse Williams was rejected by Staples’ refusal to accept an out-of-state check from him (but not from white people), see Williams v. Staples, *supra* note 11.

¹²⁵ Patricia Williams told how she was refused entry to a Benetton clothing store, see WILLIAMS, *supra* note 43, at 44-51.

¹²⁶ Patricia Williams, *Alchemical Note: Reconstructing Ideals from Deconstructed Rights* 22 Harv. C.R.-C.L. L. Rev. 401, 408 (1987).

¹²⁷ HILA KEREN, CONTRACT LAW FROM A FEMINIST PERSPECTIVE 322-323 (forthcoming 2005, in Hebrew)

Many scholars who have alluded to the nuanced nature of contractual freedom have entirely neglected the freedom TO contract. Even Rakoff and Ben Shahar, for example, who wrote with great sensitivity on how the freedom OF contract is not one freedom, did not explore the issue of freedom TO contract separately from their analysis of the freedom FROM contract.¹²⁸

Nevertheless, despite the fact that it often remains unnoticed, the freedom TO contract is crucial for participation in society, especially given its capitalistic and materialistic traits. As the legislators realized almost a century and a half ago, when abolishing of slavery, one cannot be free without the freedom to participate, through contracts, in the economic activity that enables progress. It needs to be noted again that this was the exact historical reasoning behind the enactment of the Thirteenth Amendment and the subsequent statutes that were designed to implement it. Put more philosophically, the freedom TO contract can be seen as adapting the basic impulse of liberalism – the assumption that free agency of the individual is the primary and perhaps

(quoting a letter from Prof. Williams to the author: “Re the apartment hunt: ... When I moved to the University of Wisconsin in Madison, Wisconsin, I phoned in answer to an advertisement, was enthusiastically greeted by the woman on the other end, agreed to meet at once. Twenty minutes later I was waiting on the doorstep. I spotted the landlady before she spotted me. She was walking briskly, caught sight of me, and slowed perceptibly. She walked slower and slower and by the time she made it over to me, she refused to show me the place, saying she had made a mistake and had decided to rent the place to a man, who ‘could shovel the snow’ in the winter. I couldn’t prove much so I basically tried to forget about it until I was describing my strong suspicion that this was racial discrimination about two or three weeks later. I was talking about it in the faculty lounge, and Linda Greene, the other black woman on the faculty who had just moved to town, overheard and began to describe the place to me. Over on this street? Little bay windows? green shutters? Anyway, the long and the short of it is that Linda had had exactly the same experience, with the same woman, a week or so before. She too had been told that there had been a mistake, that the apartment had already been rented ...”).

¹²⁸ Ben Shahar touches upon the subject when he mentions that a threat to the autonomy of the relying party may justify a restriction upon the other party’s freedom FROM contract, the freedom to abandon the negotiation. See Ben Shahar, *id.* at 267. Rakoff, *supra* note 117, discusses the freedom OF contract and the freedom FROM contract but his version of the later freedom is fairly sympathetic to the problem of inequality. Interestingly, when Rakoff’s analysis was later described by others he was taken as arguing on behalf of the freedom to contract of the people with unequal bargaining power. See Ian Ramsey, “*Productive Disintegration*” and the Law of Contract, 2004 WIS. L. REV. 495, 503 (“rules enforcing freedom from contract may be consistent with significant state regulation to ensure that individuals are able to exercise *freedom to contract* and make autonomous choices.”) (Emphasis added).

only way to achieve self-fulfillment. This notion can place the freedom TO contract close to the freedoms discussed above, emphasizing the need to refrain from imposing constraints on human endeavors.

Seen from this perspective, perhaps all that is needed is to allow people to contract and to remove physical and legal constraints that prevent them from doing so. That is, declaring that the ex-slave or the married-woman are no longer incapable of making contracts, for instance, is all that is needed in order to bestow the freedom TO contract upon them. However, this is probably not enough. Comparing the freedom TO contract with the two other freedoms explored earlier, it is quite evident that the negative aspect of this freedom is much less dominant and its positive side is considerably more significant. When contract law offers to support the citizens' contractual will by actively enforcing their promises to each other it does more than just allow activity. It plays a positive role. By handing the power of the state to the individuals the law expands the range of voluntary activities in which people are free to engage. Conversely, refraining from legal intervention by allowing discrimination creates the opposite effect: it reduces the scope of freedom.

The theoretical and political foundations of both the freedom IN contract and the freedom FROM contract are libertarian, especially inasmuch as they are based on negative forms of freedom. The philosophical underpinning of the freedom TO contract, on the other hand, breaks away from the traditional liberal framework. The grounds for such a freedom are to be found in "progressive" conceptions of freedom. The progressive idea of freedom asserts that no meaningful individual choice in the liberal sense can be made under improper social and economic conditions. The progressives have maintained

that the traditional liberal ideal of minimal constraint does not take into account these social and economic restraints even though such restraints are potentially more harmful than governmental limitations.¹²⁹ From this perspective, egalitarian principles are essential components of freedom. Freedom means much more than non-constraint, and thus has a positive nature.

The positive nature of the freedom TO contract makes this freedom essential to the constitution of an autonomous member of our society. It allows people to self-determine their future and enables them to direct their lives in accordance with their individual choices and goals. Holding to this perception of the freedom TO contract sharpens awareness of the fact that the people who are deprived of this basic freedom are seriously weakened and restricted. They are not free. The problem is well illustrated in the racial context by the following words of Prof. Chase:

“Instead of being the vehicle by which ideals of liberty, equality, and autonomy could be fostered, the courts and dominant constructions of contract law became the means by which African-Americans became inalienably disempowered; outsiders to the system of justice and equitable economic opportunity.”¹³⁰

Returning to the problem of discrimination, it is crucial to point to the biggest difference between the freedom IN contract and the freedom TO contract in this context. While the former is only narrowly impinged under a legal regime that bans rejection of potential partners out of discriminatory reasons, the latter is heavily jeopardized by

¹²⁹ See, e.g., Robin L. West, *Re-imagining justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law*, (2003) (confronting governmental responsibility to improve society along egalitarian lines with the liberal obsession to define freedom as non-intervention, and arguing, for example, that: “courts regarded the threat to freedom posed by minimum wage laws as a greater danger to individual freedom than the threat posed to individual survival by sub-minimum wages”, *id.* at 5).

¹³⁰ Anthony R. Chase, *Race, Culture and Contract Law: From the Cottonfield to the Courtroom*, 28 CONN. L. REV. 1, 5-6 (1995).

allowing such rejection. In other words, if – for example - someone is deprived from renting an apartment they desire, what is lost is the entire contract, with its accompanying significances, and not only one element of the contractual freedom. Yet the owner of such apartment still gets to use most of their freedom IN contract regarding all other terms of the agreement even if they are precluded from discriminating.

In addition to comparative consideration of the different freedoms, it is important to note another implication of the progressive theory: in contrast to the classic liberal ideal of minimal governmental intervention, the progressive view may necessitate *additional* regulatory involvement for the purpose of achieving and expanding freedom.¹³¹ This creates a “merry-go-round” of freedoms – freedoms that are endlessly chasing and escaping each other, competing forever with no prospect of definite winning. Admittedly, it is an ambiguous structure that is far less clear than the traditional cry for freedom OF contract in the sense that reached its peak in the *Lochner* era: complete reluctance to limit the contractual behavior of some (read: business people) on behalf of the contractual situation of others (read: Others, including the working children of *Lochner*). The question is, of course, if this more-confusing progressive structure can sharpen our understanding of the complex problem of discriminatory refusal to contract.

4. The Added Value of Competing Freedoms

The misleading message sent by a unitary concept of freedom OF contract was exposed long ago. For instance it was Max Weber who in 1922 wrote:

“The development of the law... toward freedom of contract...is usually regarded as signifying a decrease of constraint and an increase of individual freedom.

¹³¹ J. L. Hill, *The Five Faces of Freedom in American Political and Constitutional Thought* 45 B. C. L. REV. 499, 571 (2004) (arguing that “if the individual must be protected not simply from coercive government intervention, but from a wide variety of social obstacles to freedom, then certainly a greater degree of government involvement will be necessary to foster individual freedom.”)

...The formal empowerment to set the content of contracts in accordance with one's desires...in and of itself by no means makes sure these formal possibilities will in fact be available to all and everyone."¹³²

The potential contribution of thinking about three major contractual freedoms, as proposed here, lies in this gap between the formal freedom and the socio-economic reality that eliminates this freedom for many people.

First, the recognition of several claims for freedom – claims that are typically held by people who differ in their position in the market, claims with diverse combinations of negativistic and positivistic traits - “greatly expands our analytical capabilities.”¹³³

Second, thinking about diverse freedoms relaxes the traditional opposition between claims for freedom on the one hand and concerns of public policy, equality, morals, distributive justice or welfare on the other hand.¹³⁴ By identifying and exploring the freedom TO contract we create space for a new formulation of the problem.

According to this fresh view, when people refuse to contract with others on the grounds of their discriminatory “tastes”, what is at stake is freedom – contractual freedom – *on both sides*. These contractual freedoms, those of the discriminators who seek to be free to choose not to contract with people they do not want to have a relationship with, as well as those of the rejected people who are denied the opportunity to contract, are still in deep competition - but they can now be understood as stemming from the same belief in the value of contractual freedom. The new structure stands, of course, in marked contrast to the liberal conviction that freedom and equality are mutually antagonistic values. This

¹³² MAX WEBER, *ECONOMY AND SOCIETY* 729 (Guenter Roth & Claus Wittich eds., 1978) (1922).

¹³³ Rakoff, *supra* note 117, at 492.

¹³⁴ See, e.g., Kirsten L. McCaw, *Freedom of Contract Versus the Antidiscrimination Principle: A Critical Look at the Tension Between Contractual Freedom and Antidiscrimination Provisions*, 7 SETON HALL CONST. L. J. 195, 202-203 (1996).

decrease of confrontation provides, in and of itself, a better chance for mutual respect and for reduced hostility.¹³⁵

Third, from the perspective of the rejected persons who recently suffered from discrimination, locating a more precise ground for their claim might result in a better understanding of it, as well as an improved ability to appreciate its strength. The translation of the claim of equality into the contractual language facilitates a nuanced balancing of that claim against the traditional argument of freedom OF contract. Once the freedoms are discussed in tandem, using the same contractual logic and the same professional language, it becomes harder to dismiss out of hand, within the contractual sphere, the claim that previously did not have a contractual name.

The logical transition made here may be compared to the powerful argument made back in 1875,¹³⁶ and repeated ever since,¹³⁷ in order to defend and strengthen the freedom OF contract (in the sense called here freedom IN contract) against public policy concerns. Sir George Jessel converted the claim for freedom into a public policy concern, saying:

¹³⁵ Although he did not differentiate between the freedom OF contract and the freedom TO contract Prof. Ian Ramsay tells of a teaching experience that gives hope along the lines suggested here. When he teaches a 1940 decision of the Canadian Supreme Court that upheld a refusal of a tavern owner to serve blacks “...the students usually conceptualize it as a case of liberty (of the tavern owner) versus equality (for the black consumer), or liberty versus state intervention. However, transforming the dialogue into freedom from contract (for the tavern owner) trumping freedom to contract (for the black consumer) reflects the unavoidable conflict between freedoms embedded in the legal construct of freedom of contract and seems to be a novel and sometimes enlightening reconceptualization for the student.” Interestingly, Ramsey analyzes the discriminator’s claim for freedom under the freedom FROM contract. Albeit possible, this classification seems problematic in light of the fact that contrary to the common use of the term “freedom FROM contract” here the discriminator is usually interested in having a contract and only insists on the right to refuse special type of potential parties out of the many other available alternatives. *See* Ramsay, *supra* note 128, at 503-504.

¹³⁶ *Printing & Numerical Registering Co. v. Sampson*, 19 L.R. – EQ. 462 (V.C. 1875).

¹³⁷ Not surprisingly one of the modern scholars who used Jessel’s argument is Richard Epstein whose resistance to the regulation of antidiscrimination norms was described earlier. *See* Richard A. Epstein, *Contracts Small and Contract Large: Contract Law through the Lens of Laissez-Faire*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 25, 58 (F. H. Buckley ed., 1999).

“It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that a man of full age and competent understanding shall have the utmost liberty of contracting...”¹³⁸

This rational effort had the ability to put the two concerns of public policy “on the same page” in a way that supported the freedom of contract by adding to it public and social meanings that many preferred to neglect. Similarly, seeing the antidiscrimination claim not only as a public concern but also as an *internal* contractual concern, based on contractual principles, should make it more difficult to ignore.

V. Supporting the Freedom TO Contract

After exposing, defining and naming the freedom TO contract, the next task is to find a way to incorporate it into the current contract doctrine. The suggestion below is to include the protection of this freedom in the duty to negotiate in good faith. It is further proposed to utilize the no-retraction model recently presented by Omri Ben Shahr as an additional justification for making such a move.

A. The Precontractual Duty of Negotiating in Good-Faith

One way to support the freedom TO contract of people discriminated against is to conceptualize the discriminators’ refusal to contract as a breach of their duty to negotiate in good faith.¹³⁹ The general idea is that in a good faith regime the contracting parties “are no strangers. They have to be considerate towards each other.”¹⁴⁰ Under such a view,

¹³⁸ Printing & Numerical Registering Co., *supra* note 136, at 465.

¹³⁹ Another way is using consumer protection laws attack disparate treatment as “deceptive” misrepresentation. See AYRES, *supra* note 18, at 141-143.

¹⁴⁰ Nili Cohen, *Pre contractual Duties: Two Freedoms and the Contract to Negotiate*, in GOOD FAITH AND FAULT IN CONTRACT LAW (Beatson & Freidman, eds.at) 25, 28 (1995).

the discriminator's behavior shall be perceived as an illegitimate contractual practice that carries liability. The presence of the discriminator in the market – through offering to sell goods, provide a service, rent an apartment or hire an employee, as leading examples – is to be theorized, under such analysis, as constituting a contractual negotiations process. The discriminator's withdrawal from such negotiations, if done for discriminatory reasons, should in turn be considered as illegitimate business behavior for which the discriminator should compensate his/her victim.

Filling the amorphous standard of good faith with antidiscrimination content should not present a problem of authority, thanks to the broad social consensus that led to the enactment of the constitutional and civil rights norms aimed at securing more equality. Moreover, as portrayed here, the duty of good faith is expected to play its well-established role: to serve as an “excluding” mechanism, one which defines and highlights negative conduct which is unacceptable, rather than providing guidelines for appropriate behavior. A similar ideology can be found in the more specific Common Law “duty to serve” under which an owner of a store, for example, is not allowed to discriminate between potential customers and is required to serve them all on an equal basis.¹⁴¹ What is inspiring about this analogy is that the duty to serve goes beyond the protection of the victim and extends to condemnation of the business behavior of the store-owner. Used this way, the Common Law doctrine functions as an educator no less than as a source of defense. If an analogous – but wider – antidiscrimination message is going to be

¹⁴¹ Neil Williams, *supra* note 83, at 201-202, McCaw, *supra* note 134, at 205.

implemented through the doctrine of good faith, then such a message, coming from *within* contract law, should sound loud and clear and hopefully be influential.¹⁴²

The problem is that here, in this context, the Article's focus on the *pre-contractual* stage, as opposed to the contractual period, appears to make the application of contractual tools more complicated.¹⁴³ The reason is that it is not clear if and to what extent such a duty is recognized under the American contractual doctrine. While many sound legal systems around the world sustain and even expand a precontractual duty of good faith in an effective and powerful manner that coexists with the market and supports its functioning - American contract law appears to be hesitant on this point.¹⁴⁴

¹⁴² For the use of the doctrine of good faith as a tool for embracing equality into contract law *see, e.g.*, Barak, *supra* note 108, at 159-164.

¹⁴³ This might explain why the few calls for contractual coping with the issue only applied their analysis to *contractual* situations. *See* Neil Williams, *supra* note 83; Emily Houh, *Critical Race Realism: Reclaiming the Antidiscrimination Principle through the Doctrine of Good Faith in Contract Law*, 66 U. PITT. L. REV. (forthcoming 2005). Prof. Harris has been skeptical toward proposals to use the doctrine of good faith in this context and part of her doubt emerges from the pre-contractual problem of rejection from even participating in the contractual game. With respect to Williams's suggestion (*id.*) she writes: "For now, however, it would be impractical for... victims to bring a claim under contract law because it is unclear that the law will evolve to incorporate a proscription against racial discrimination into the duty of good faith and fair dealing. Moreover, even if such a change occurs, only a subset of ... plaintiffs would benefit from bringing claims under contract law, because customers who were merely browsing in the store could arguably be characterized as not yet engaged in the formation, performance, enforcement, or termination of a contract." *See* Harris, *supra* note 86, 18-19.

¹⁴⁴ *See, e.g.*, Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy", 116 HARV. L. REV. 16, 93 (2002) (Describing the Israeli law approach, which is heavily influenced by his views, and saying: "Indeed, good faith constitutes one of the main tools with which I fulfill my role as a judge. By virtue thereof, I have held that every power given to an individual in private law should be exercised in good faith." the footnote that is attached to this sentence refers to Farnsworth's works and reads: "This concept has not yet been recognized as a general legal principle." Barak refers to Farnsworth's article, *infra* note 145. For a critical description of such an American approach *see* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70 (1993) ("Wall Street lawyers of world fame, echoed by their clients, told me that good faith disclosures during negotiations are not required in the world of sophisticated businessmen during negotiations in the United States. The concept of good faith, they conceded, was not unknown, but its application was limited to the phase of contract performance. During contract negotiations, neither good faith dealing nor good faith disclosures was required, and everyone was free to take advantage of the ignorance or misperceptions of another, no matter how unfair or unethical, except in the context of a special relationship where the parties repose trust and confidence in each other (as, for instance, in a fiduciary relation), which usually does not apply to arm's length business transactions."), *id.* at 72-73. The author discusses the extensive pre-contractual duty of good faith under Italian law and German law and compares it to the American parallel approach. It is maintained that: (a) the above description as made by the American lawyers is far from exactly illustrating the American law; and (b) there is room under American contract law for a heightened

Nevertheless, more than a few have argued that the duty to negotiate in good-faith, or, at a minimum, an indirect weaker version thereof, can also be found under the American law of contracts.¹⁴⁵ Among those who believe in the existence of such duty, there seems to be no agreement regarding its scope, but it is important to acknowledge a consensus that the *pre-contractual* duty of good faith is significantly narrower than its *contractual* counterpart.¹⁴⁶ Still, at least some of the writers have argued that the American concept of negotiation in good faith is developing, and that contrary to traditional approaches there is an increasing willingness to impose precontractual liability.¹⁴⁷

Other than conservatively following traditional concepts, the central argument against the extrapolation of the duty of good faith from the contractual to the pre-contractual stage lies in the fear of imposing liability in the absence of consent. Under

duty of good faith and fair dealing in precontractual negotiations. *See also* Nili Cohen, *The Effect of the Duty of Good Faith on a Previously Common Law System: The Experience of Israeli Law*, in GOOD FAITH IN CONTRACT: CONCEPT AND CONTEXT 189-212 (Brownsword, Hird and Howells eds., 1999) (Discussing comparatively several different legal systems and concluding with regard to the comparison between the English system and the Continental system that “the gap between the systems is not as wide as might initially appear”), *id.* at 194. For a similar argument based upon the same comparison *see* Palmieri, *id.* at 77. (“The Article will show that upon closer scrutiny the concepts of the duty of good faith and fair dealing, and of good faith disclosures as understood in the United States, are not that dissimilar from those in the nations of continental Europe”).

¹⁴⁵ *See, e.g.*, James J. White, *Good Faith and the Cooperative Antagonist*, 54 SMU L. REV. 679, 679 (2001) (“no court, nor any academic writer, has ever been so bold or so gauche as to suggest that good faith should not attend the obligations of parties under the UCC”). Melvin A. Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1811-1813 (2000) (presenting cases in which the behavior of a party impelled the court to impose a duty to negotiate in good faith, when such a commitment did not arise from the agreement); E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 273-285 (1987). (tracing types of behavior that the courts categorized as “unfair dealing” in precontractual negotiations, including “Refusal to Negotiate” and “Breaking off Negotiations”).

¹⁴⁶ For an in-depth investigation of the *contractual* duty of good faith, done from a standpoint of supporting a stronger concept of good faith in American contract law see recently a series of three articles by Prof. Houh: Emily Houh, *Critical Interventions: Toward an Expansive Equality Approach to the Doctrine of Good Faith in Contract Law*, 88 CORNELL L. REV. 1025 (2003) (focusing on at-will employment); Emily Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?* 2005 UTAH L. REV. (forthcoming); Houh, *Critical Race Realism*, *supra* note 143. For a concise historical background of the immigration of good faith into American law *see* Joel Iglesias, *Applying the Implied Covenant of Good Faith and Fair Dealing to Franchises*, 40 HOUS. L. REV. 1423, 1426-1427 (2004).

¹⁴⁷ Farnsworth, *supra* note 145, at 222.

this line of reasoning, deeply rooted in the classical will theory with its “meeting of the minds” model, the main justification for inflicting a *contractual* good faith duty is not valid when it comes to the process of contracting, especially where this process proved fruitless. In a nutshell, the world of pre-contractual negotiations is presumed to be liability-free, or, as put by the legendary Farnsworth:

“...this view of the precontractual period is what I call the common law’s “aleatory view” of negotiations: a party that enters negotiations in the hope of the gain that will result from ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations.”¹⁴⁸

The general counter-argument questions the dichotomy of negotiation/contract upon which the basic resistance is founded. As noted by many contractual critiques and especially by the school of relational contracts, the transition from pre-contract to contract has proven to be far less dramatic and momentous than was believed under traditional doctrine. Consequently, it would be wrong to imagine a twofold regime that moves abruptly from “no-contract” to “contract” and accordingly from “no” to “full” liability. The alternative view suggests a spectrum of mutual liabilities growing gradually while corresponding to the intensity of the connections between the parties. Indeed, this is an entrenched idea dating back to Fuller and Perdue’s seminal article that introduced the need and justification for a “flexible scheme” of enforceability instead of an “all-or-nothing theory”.¹⁴⁹ Applying this view to the duty of good faith would, of course, subvert the belief that the duty exists, and should exist, only after the contractual moment had arrived.

¹⁴⁸ Farnsworth, *supra* note 145, at 221.

¹⁴⁹ Leon L. Fuller & William R. Perdue, *The Reliance Interest in Contract Damages (2nd part)*, 46 Yale L. J. 373,419 (1937).

A full discussion of the pros and cons of extended precontractual liability goes beyond the scope of this Article, and still it is meaningful to note that with regard to the special focus on discrimination - one of the main considerations that supports limited liability might actually lose its strength. When writing against “European” levels of good faith, several American scholars have argued that too much liability at too early a stage of doing business would create a negative incentive to participate in the marketplace, deterring people from engaging in an activity that carries growing risks - what Farnsworth called “an undesirable chilling effect.”¹⁵⁰ The assumption upon which such an argument is based is that full participation in the preparations for entering the market, i.e. negotiations, is valuable. It follows that while a chilling effect is harmful, an opposite “warming effect” might be welcomed. Going back to discrimination, the question is what might be the effect of using precontractual liability to ban rejections from the market on the grounds of discrimination. Clearly such a move is aimed at enabling *more* people to participate in the negotiations and thereby improving their chances to achieve a contract and enter the marketplace. From this perspective the specific content of a good faith duty that commands equal treatment is predicted to have a positive “warming effect”. Certainly, such effect may be accompanied by some degree of “chilling effect” on the side of the discriminators - but even so, the main danger of shrinking market activities is weaker than in any other debate regarding the desirability of precontractual liability.

¹⁵⁰ See, e.g., Farnsworth, *supra* note 145, at 243; Ben Shahr, *Contracts without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1850-1851 (2004).

Moreover, use of the broad standard of good faith, which is receptive to judicial case-by-case interpretation, has several main advantages of flexibility in comparison to the tyranny of formalities that many times fail litigators under antidiscrimination rules.¹⁵¹

Assuming that the duty of good faith can accommodate a ban of discrimination - at least according to the more generous interpretations of the scope of the precontractual liability under the American doctrine of contracts – the question would be how to explain the decision to assign *contractual* results to the rejection of someone for discriminatory reasons. Another way to phrase this would be to ask, on what grounds of liability can we lay this specific precontractual liability. The following section offers to utilize the model of “no-retraction”, structured by Omri Ben Shahaar, as a possible reply.

B. The “No-Retracton” Basis of Liability

1. The No-Retracton Principle

As Prof. Patricia Williams waited at the doorstep of the apartment she wanted to rent, its owner was walking towards her. They had spoken earlier on the phone and were both making progress in the negotiation process, getting closer, physically and metaphorically, to the finalization of the contract. “She was walking briskly”, Patricia tells, but then she “caught sight of me, and slowed perceptibly. She walked slower and slower and by the time she made it over to me, she refused to show me the place, saying she had made a mistake and had decided to rent the place to a man, who ‘could shovel the snow’ in the winter.”¹⁵²

This is a story of a visible retraction from the negotiation. It is in cases like these, I suggest, that the model of no-retraction can further support the proposal, made in the

¹⁵¹ See generally *supra* Part I.E.

¹⁵² See *supra* note 127.

previous section, to view discriminatory refusals to contract as a breach of the duty to negotiate in good faith.¹⁵³ That such support comes from the unexpected direction of “law and economics” is especially valuable to the basic thesis that underlies the current analysis: it gives more reason to believe that when considered under a contractual “vocabulary”, the egalitarian concerns will be seen as more organic and legitimate and less as a threat.¹⁵⁴

The principle of “no-retraction” was recently introduced by Prof. Ben Shahar in an article of his, and is defined by him as offering “an alternative to one of the pillars of contract law, that obligations arise only when there is ‘mutual assent’ – when the parties reach consensus over the terms of the transaction.”¹⁵⁵ As Ben-Shahar explains:

“The basic insight is the following: a party who manifests a willingness to enter into a contract at given terms should not be able to freely retract from her manifestation. The opposing party, even if he did not manifest assent, and unless he rejected the terms, acquires an option to bind his counterpart to her representation or charge her with some liability in case she retracts”¹⁵⁶

Before delving into some of the nuanced arguments offered by Ben Shahar’s analysis, it seems helpful to experiment somewhat intuitively with the new idea.

¹⁵³ It is important to realize that what is suggested by Ben Shahar is a new basis for contractual liability rather than a new doctrine. Naturally, the proposed new basis has doctrinal applications, discussed in the second part of the article. As pointed by Ben Shahar one of the prominent applications is to “the requirement to negotiate in good faith.” See also *infra* notes 169 to 171 and accompanying text.

¹⁵⁴ By this I do not mean to imply two things: first that “law and economics” cannot and should not play a social role (it does!), and, second that the “social” problem explored here has no economic implications (it does!). The main emphasis is, rather, that Ben Shahar’s novel model was not originally designed with discrimination in mind or with an inclination to fulfill distributional goals out of social concerns. As Ben Shahar himself conclude: “The analysis in this Essay focuses on one type of justification for the no-retraction liability regime, namely, an economic justification...” See Ben Shahar, *Contract without Consent*, *supra* note 17, at 1872.

¹⁵⁵ *Id.* at 1828.

¹⁵⁶ *Id.* at 1830.

Applying the above definition to the Patricia Williams' apartment hunt would mean that the landlady had no right to retract, and if she did choose to do so she should be charged. Patricia was responding to an advertisement that in and of itself manifested an interest in entering into a rental contract. As the location of the apartment was certainly known (recall that Patricia sat on its doorstep) and the rental fee was probably discussed earlier over the phone, it seems that the landlady had manifested the "willingness to enter into a contract at given terms" as required under the no-retraction principle. Therefore, in accordance with the new approach, she "should not be able to freely retract from her manifestation".¹⁵⁷ Pragmatically, it means that Patricia should have the right to either enforce the deal or be compensated for its loss.

2. The Basic Match

The new no-retraction approach is meant to provide "a systematic foundation for one of the more ambiguous doctrines in contract law – the requirement to negotiate in good faith."¹⁵⁸ Accordingly, it is a theory that was developed with the contractual tool proposed here in mind. Little wonder, therefore, that it seems that the archetypical situation of precontractual discrimination matches up seamlessly with the "no-retraction" framework. It starts with the name. "Retraction", i.e. pulling back, revoking, withdrawing, turning away,¹⁵⁹ is precisely what the discriminator does upon refusing to deal with the opposing party. But beyond this, the approach works well with the events on both sides of the contractual negotiation.

First, on the discriminators' side, a clear manifestation of the interest in contracting is usually found. They are either repeat actors in the marketplace - being

¹⁵⁷ *Id.* at 1830.

¹⁵⁸ *Id.* at 1860.

¹⁵⁹ OXFORD ENGLISH DICTIONARY ONLINE available at <http://dictionary.oed.com>

store-owners, employers, caterers, etc. - or occasional visitors to the marketplace who came to do one-time business. In any case, they are usually the *initiators* of the negotiations and therefore the ones who not only have expressed a clear willingness to contract in general but have also by and large dictated the first version of the contractual terms. The last component is of major significance when it comes to the no-retraction principle. The terms outlined by the discriminators reflect their desired view of the planned transaction. This view, in turn, is a crucial component for a no-retraction regime since its logic lies in the basic notion that one can be bound to what one purported to seek.¹⁶⁰ Importantly, the no-retraction model is asymmetrical.¹⁶¹ It truly gives up the need for mutual assent and hence all that is required for its implementation is an evident representation of the deal as desired by the party who now seeks to retract.

Second, and as a result of the first point, the rejected party in discriminatory situations is characteristically interested in the transaction that was offered and expects to be able to continue the negotiations. When the moment of retraction arrives, it is seldom the terms of the deal that are at issue. Since the retraction is caused by discrimination, what actually takes place is the refusal of one party to continue negotiating and ultimately contract with the other party because of the latter's "characteristics" - it has nothing to do with the contractual terms. Therefore, the main difficulty of giving up the traditional model of consensus – the concern of suppressing the contractual will – is especially weak in the context of the typical discrimination case.

¹⁶⁰ Hypothetically, we can imagine a strategy that explicitly announces the discriminatory "taste" of the businessperson who initiates the transaction, for instance by use of the disgraceful signs which were used in the past to prevent entrance from members of unwanted groups. However, given the social connotations of such a move, the likelihood of an occurrence of this type is very low. More importantly, while the logic of using the "no-retraction" will certainly lose its power, the behavior itself will be easier to defeat – both under the duty to negotiate in good faith that under the current antidiscrimination laws.

¹⁶¹ *Id.* at 1840.

3. The Unwanted Partner

The no-retraction principle offers a “general lens” through which to look at a pattern of “contracts without consent”.¹⁶² The foremost manifestation of waiver of consent if precontractual discrimination is not to be allowed is the problematic creation of a contract with an unwanted partner. The predicament is described by Ben Shahaar in economic terms of “allocative inefficiency”, in which “the parties might end up sticking with unwanted contractual partners and, consequently, miss out on opportunities to maximize the potential surplus.”¹⁶³ Two replies are then evoked: first, imposing liability does not necessarily mean compelled relationship – one can always “buy” one’s way out by compensating the unwanted party (sharing the surplus brought by the later, preferred party with the earlier, rejected one);¹⁶⁴ and, second, while “it is true that the burden of liability can lead to an ineffective choice of partner” the difficulty is less severe than it might seem at first glance.¹⁶⁵

When the difficulty of the unwanted partner is transferred to the discrimination arena it seems to lose some of its inefficiency weight. Thinking about Patricia Williams sitting on the doorstep and watching the landlady slowing down, we must admit that there is an emotional advantage for the landlady in renting her place to a later, white partner rather than to Patricia. Setting aside questions of morality, this sense of being more “comfortable” with one’s choice can be compared to the loss of surplus discussed above. However, the expected loss from unwanted partners appears, in this specific context, to be even smaller than the “fairly small” loss predicted by Ben Shahaar.

¹⁶² *Id.* at 1836.

¹⁶³ *Id.* at 1852.

¹⁶⁴ *Id.* at 1852.

¹⁶⁵ *Id.* at 1853.

One of the major differences is that the appearance of the later and better partner can justify the retraction only in Ben Shahaar's exemplary hypothesis. In the discrimination context no later partner has arrived yet, and the retraction is based upon an absolute rather than relative hostility towards the first potential partner. Such hostility triggers the withdrawal irrespective of the possible appearance of a more attractive partner.

Another difference is that giving up a later partner who offers to pay more, or to do more for the same consideration,¹⁶⁶ carries an *objective* loss that can be easily translated into a wider social loss. Conversely, giving up a later partner who is more desirable according to the first party's "taste" represents a *subjective* loss. The personal contingency of such loss makes its influence on society as a whole ambiguous and hard to measure. From an aggregated social viewpoint, the "happiness" of the discriminator resulting from the ability to reject an unwanted partner will be, at a minimum, offset by the harm to the excluded partner.

4. Further Implications

The two points explored above – the basic applicability of the no-retraction regime to situations of discriminatory refusal to contract and the problem of the unwanted partner – do not, of course, exhaust the implications of applying the no-retraction model to precontractual discrimination. Further exploration of the arguments that were raised in support and in criticism of the new model indicates several additional implications of applying the no-retraction model, which are especially relevant in the present context.

¹⁶⁶ *Id.* at 1853 ("a new partner appears, offering a transaction that is more efficient...")

First, the economic theory is brought into play in the discrimination arena as a continuance of Ben Shahar's work, which he concluded by saying:

“It remains for future work to explore the extent to which the approach developed in this Essay has the horsepower to resolve pragmatically the problems that have proven difficult for current doctrine and to examine whether these solutions advance the various social objectives associated with contract formation.”¹⁶⁷

These words are read here as receptive enough to include the common precontractual problem of discrimination.¹⁶⁸

Second, although much ink has been spilled in debating the strict liability constituted by the no-retraction principle, the new principle seems to work best and to draw less criticism when the retraction has some degree of wrongfulness to it.¹⁶⁹ As pointed out by Prof. Markovits, when the retraction is done in good faith the justification for imposing liability needs to be better grounded.¹⁷⁰ However, when it comes to the discrimination discussed here the wrongfulness as well as the bad faith seem evident enough. Moreover, the unreasonable and irrational nature of the retraction – to be found

¹⁶⁷ *Id.* at 1872.

¹⁶⁸ In light of the quoted words it should be noted that this Article does not attempt to estimate the general plausibility of the no-retraction principle, but rather, to use it in one important context of one common precontractual problem. However, the suggestion made here regarding the match between the issue of discrimination as a cause for breaking the negotiations and the new regime does put forward a supportive view of the latter. It is impossible to cover here the range of the general arguments regarding the “no-retraction” principle. Three scholars wrote commentary pieces that offer different critical views on the new principle as defined by Ben Shahar: see Jason S. Johnston, *Investment, Information, and Promissory Liability*, 152 U. PA. L. REV. 1923 (2004); Ronald J. Mann, *Contracts – Only with Consent*, 152 U. PA. L. REV. 1873 (2004) and Daniel Markovits, *Commentary: The No-Retracton Principle and the Morality of Negotiations*, 152 U. Pa. L. Rev. 1903 (2004). Ben Shahar already responded briefly in Omri Ben Shahar, *Response: Mutual Assent versus Gradual Assent: The Debate over the Right to Retract*, 152 U. PA. L. REV. 1947 (2004).

¹⁶⁹ Ben Shahar, *Contract without Consent*, *supra* note 17, at 1839 (“Liability under this approach, like tort liability, results from a unilateral wrongful action of a party – in this case, retraction from representation.”)

¹⁷⁰ Markovits, *supra* note 168, at 1912-1913.

by Ben Shahaar in many retractions¹⁷¹ – is especially apparent where the only motivation for breaking off the negotiations is discrimination.

Third, as discrimination of the species discussed here often happens while shopping,¹⁷² or in other situations in which the negotiations are relatively short, one might wonder how well it can be incorporated into an approach that highlights negotiations as the basis for a “sliding scale of liability”. Here, it is worth noting that the harmonious nature of basic match, discussed above, does not seem to be undermined by the brevity of the negotiations. Remarkably, the “no-retraction” basis for liability is presented as capable of application at the early stages of the negotiations and even in situations which might be seen as lacking negotiation altogether.¹⁷³ More specifically the principle is even discussed with regard to the contractual analysis of the process of responding to advertisements – just as Patricia Williams did when she looked for an apartment to rent – and there too it is presented as apposite if, for instance, “the soliciting party... does not fairly consider one of the bids.”¹⁷⁴

This position drew criticism of Ben Shahaar for being too hasty in applying his new approach.¹⁷⁵ However, it appears that applying such an extensive theory to a real-life problem such as discrimination can teach a valuable lesson about the limited ability to abstractly define the boundaries of negotiation: if, to use Patricia’s example, an advertisement is very specific and the interested party responds to it positively, then an illegitimate breaking of the process of negotiation may occur despite its restricted length. The length of the negotiation is surely one of the indications for imposing liability, but it

¹⁷¹ Ben Shahaar, *Contract without Consent*, *supra* note 17, at 1841-1842.

¹⁷² *See, e.g.*, Harris, *supra* note 86; Graves, *supra* note 54.

¹⁷³ *Id.* at 1843.

¹⁷⁴ *Id.* at 1868.

¹⁷⁵ Markovits, *supra* note 168, at 1918.

is definitely not the only one. Another major factor that needs to be evaluated is the motivation for the retraction: the more wrongful it is the less the length of the negotiations matters.

The fourth consideration is tightly connected to its predecessor and it concentrates on morality. Aptly, it is more developed outside of the economic analysis offered by Ben Shahaar. Prof. Markovits dedicates a large part of his critique to this philosophical aspect, maintaining that the no-retraction regime leans on a deeper structure - the morality of the negotiation relation.¹⁷⁶ Concisely, the argument - as developed by Markovits - assigns moral value to the relationship between the parties to a contract. Following the “special bond” theory of Joseph Raz¹⁷⁷ and Bruce Ackerman’s “relational justice”,¹⁷⁸ Markovits suggests that in order to add moral foundation to the “no-retraction” principle it is essential to establish the morality of the negotiation phase. In order to do this, Markovits asserts, it is essential to have some level of relationship between the parties, and this, in turn, dictates an inflexible definition of the negotiations.¹⁷⁹ This last debate, over the scope of negotiations, was discussed earlier.¹⁸⁰ What is important here is to notice the assigning of morality to the process that leads to contract. Such a view emerges from the value of the relations that contracts establish between those who engage in them.

This positive value is of great importance in the present context, since the negative effect of discrimination lies precisely in the many meanings of the denial of such a contract. Therefore, from the viewpoint of a discriminated person, the emphasis on the

¹⁷⁶ Markovits, *Id.* at 1913-1921.

¹⁷⁷ Joseph Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY: ESSAYS IN HONOR OF H.L.A. HART* 210 (P.M.S. Hacker & J. Raz eds., 1977).

¹⁷⁸ Bruce Ackerman, *Temporal Horizons of Justice*, 94 *J. PHIL L* 299, 304-307 (1997).

¹⁷⁹ Markovits, *supra* note 168, at 1917.

¹⁸⁰ See *supra* notes 172-175 and the accompanying text.

morality of the relationship that is created under negotiations is of immense importance. The ability to be a part of negotiation, not to be exposed to harsh retraction when one's otherness becomes evident, to continue the negotiation and ultimately to achieve a contract - these are vital conditions to human contact and social participation.

Finally, it is important to briefly point to the "consciousness raising" potential of the "no-retraction" principle. Ben Shahar observes that replacing the arbitrary liability impositions that cannot be explained under the traditional consensus regime with an alternative basis will increase predictability.¹⁸¹ Apart from its obvious economic value, predictability has an educational power which correlates with this Article's call. People should know in advance that discriminating against others who have shown interest in their contractual "offer" (including invitations to offer) is an act done in *bad faith*. They should become accustomed to the notion that discrimination constitutes illegitimate business behavior that is not tolerated in the market and carries liability. Economists would say that it is all about creating the right incentive not to discriminate, while philosophers might put the spotlight on the morality of the negotiation process. At any rate, thinking in terms of no-right-to-retract offers a sharp tool that is capable of sending out the precise message.

In summing up the attempt to employ the innovative principle of "no-retraction" in the precontractual discrimination context, a few words about the relationship between tort law and contract law are due. Indeed, this is an old and lengthy debate which once even led to the celebrated announcement of *The Death of Contract*.¹⁸² While one can certainly doubt its importance - especially if holding to a jurisprudence that generally

¹⁸¹ Ben Shahar, *Contracts without Consent*, *supra* note 17, at 1869.

¹⁸² GRANT GILMORE, *THE DEATH OF CONTRACT* (Ronald. K. L. Collins, ed., 1995)

resists the classical tendency to treat legal categories religiously - it seems that whenever precontractual problems are considered the argument that “this is an issue of tort law” reappears. Here, the suggestion of a freestanding contractual basis of liability with contractual logic and structure¹⁸³ may provide helpful armor to contractual arguments, which might be viewed as intruding into tort law fields. More importantly, the primary distinction between the tort and the contractual standards is that, to recover in tort, one must show that the suspect behavior was *intentional*¹⁸⁴ - which is, as mentioned, the greatest obstacle faced by plaintiffs under the current antidiscrimination laws. The proposed shift to an alternative contractual framework has the advantage of removing the requirement to prove that the discrimination was *intentional* – one of the major obstacles faced by potential plaintiffs.

Conclusion

The present absence of contractual attention to the “freedom TO contract” – as defined here - is remarkable. The exact freedom upon which the entire system relies is so trivialized that when people are discriminated against by way of being deprived of this essential freedom - contract doctrine, in general, remains silent. In the meantime, the constitutional legacy of the Thirteenth Amendment – understood broadly as a command to abolish slavery to the point of equal economic and social possibilities for all– is dispersed among numerous enactments in a patchwork that seems to obscure the rather straightforward message.

¹⁸³ At least one of the “no-retraction” critiques has argued that this is exactly where the theory is overstated. See Markovits, *supra* note 168, at 1912-1913.

¹⁸⁴ See, e.g., Michelle Oberman, *Sex, Lies and the Duty to Disclose*, (forthcoming 2005, on file with author) (presenting the same advantage of contractual norms over tort ones in the context of imposing a duty to disclose relevant information in agreements between intimates.)

This Article challenges the traditional boundaries between contract doctrine, on the one hand, and the constitutional decree of the Thirteenth Amendment and the cluster of antidiscrimination laws, on the other hand. In doing so it seeks to end the “separate but equal” manner of discussing the situation: thinking about discrimination as if no contracts are involved while analyzing contracts as if no problem of discrimination exists. It is to this traditional division that the Article responds by suggesting a new form of discourse: contractual discourse that takes into account constitutional concerns; “private” law that takes care of “public” issues.

Undeniably, such a call cannot constitute a comprehensive discussion. Rather, it is designed more towards opening scholarly discussion of the possibility of constitutional content as an integral part of contract doctrine. In this context it is important to emphasize that the current exploration is in addition to, and not instead of, the treatment of discrimination under the current laws. Whatever the flaws of the present cluster of laws may be, the argument made here does not focus on what to do with them.¹⁸⁵ Instead, what is developed herein is an alternative claim that derives its power from being internal to the contractual way of thinking and from being described in contractual terms. Ultimately, however, this alternative not only offers a better understanding of the issue of precontractual discrimination - hopefully it can also add a legal tool which is more flexible, less deterring and not dependent upon the tricky requirement of proving the discriminators’ intentions.

Several practical implications of the suggested alternative remain open for trial. The most important is the complex question of remedies. As mentioned earlier, some current litigated cases were extremely successful in terms of the amount of damages

¹⁸⁵ But *see supra* Part I.E.

handed down against the discriminator. Contractual claims, on the other hand, will probably yield lower levels of damages, even under a remedial approach that affords compensation for non-monetary injuries and perhaps also includes some level of “punitive” damages. While this might become a disadvantage, it could also prove beneficial by making it easier and less deterring for courts, which might be prone to dismiss fewer cases than they tend to do under the current regime with its dramatic consequences.

Another concern that necessitates some experience with the contractual approach relates to the influence law might have on society. The reconstruction and repositioning endeavors that are made here are done with business activity and with market actors in mind. Ultimately the hope is to convince potential discriminators that discrimination constitutes wrong business behavior. In this light, and given the fact that discrimination is awfully stubborn, the question is will the message be received.

Finally, and on a different level, this Article can also be read as a case study on the broader issue of legal borders. Read this way, it has the potential of suggesting the mutual benefit that both “public” and “private” discourses can gain from crossing over one into the other. Creating an integrated discourse of the sort experimented with here has the potential of fundamentally improving the legal treatment of problems that have social and economic components.

Returning to the starting point of this Article - the example of baseball hero Jackie Robinson beautifully illustrates the difference that being refused a contract or being offered one can make. Branch Rickey, the general manager of the Brooklyn Dodgers, offered Robinson a contractual opportunity never before afforded black players and

eventually made him the first black baseball player to play in the Major Leagues, breaking the historic segregation between the Negro Leagues and the Major Leagues. This ability to make a contract that was previously denied meant so much more than just a contract – it was the key to economic and social participation, a symbol of integration, a fulfillment of the constitutional promise of equality.

On March 2nd 2005 Jackie Robinson was posthumously awarded the Congressional Gold Medal. When Robinson was nominated for this award - the highest that Congress can give to a civilian - Senator John Kerry told his colleagues that Robinson's signing by the Dodgers was so significant because it "engaged the American people in a constructive conversation about race."¹⁸⁶ Robinson's story, so much a part now of the American heritage, and particularly the "constructive conversation" it offered to the American people, illustrate this Article's response to the question posed in the title: contract doctrine definitely does have, and should have, something constitutional to say, and it is about the indispensability of the freedom TO contract.

¹⁸⁶ Barry M. Bloom, *Robinson to receive Congressional Gold Medal*, MLB.com (1/31/05) available at http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp?ymd=20050128&content_id=936492&vkey=news_mlb&fext=.jsp. I am indebted to my dear friend Danny Evron for pointing this out to me just as I was completing this Article.