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INTRODUCTION

The unconscionability doctrine in contract law enables a court to decline to enforce a contract whose terms are seriously one-sided, overreaching, exploitative, or otherwise manifestly unfair.¹ Some examples of its deployment include the refusal to enforce: contracts that charge usurious loan rates,² a contract paying a grossly inadequate sum for an annuity,³ a one-sided, mandatory employment arbitration agreement that heavily favored the employer,⁴ arbitration clauses that specify indeterminate or remote locations or that require high fees so as to discourage efforts at redress,⁵ contracts with people of modest means that feature aggressive re-

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1. See, e.g., Restatement of Contracts (Second) at § 208 and the U.C.C. § 2–302.
2. See, e.g., *American Home Improvement Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964); *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971); *Murphy v. McNamara*, 416 A.2d 170 (Conn. 1979).
3. *Waters v. Min Ltd.*, 587 N.E. 2d 231 (Mass. 1992) (finding unconscionable a contract that paid \$50,000 for an annuity worth \$189,000).
4. *Armendariz v. Foundation Health Psychcare Services, Inc.*, 2000 Cal. Lexis 6120 (Cal. 2000).
5. *Patterson v. ITT Consumer Financial Corp.*, 14 Cal. App. 4th 1659, 1666 (Cal. 1993) (in-

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possession terms and very high interest rates,⁶ sales contracts that disclaim warranties and consequential damages,⁷ exclusive option contracts that permit a buyer both to refuse goods and to prevent the supplier from selling them elsewhere,⁸ and a contract levying a high, nontransferable membership fee for a shopping club from which it was practically infeasible for consumers to benefit.⁹

Egalitarians and other liberals generally favor the doctrine as a way to resist grossly inequitable contracts that, often, especially burden the poor. But a standard criticism of the doctrine is that it is paternalist: it unravels a voluntary agreement between responsible agents just because the terms enforce too harsh a bargain against one party. Although the unconscionability doctrine is quite controversial, its characterization as paternalist is not. Indeed, the unconscionability doctrine is commonly cited to *exemplify* paternalism in the law.¹⁰ Rather than wrangle over the

validating an arbitration clause that came 'perilously close' to denying the opportunity to pursue legal redress).

6. See, e.g., *Williams v. Walker Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

7. See, e.g., *Henningsen v. Bloomfield Motors*, 161 A.2d 69, 86 (N.J. 1960) (invalidating car seller's disclaimer clauses that attempted to waive implied warranty of merchantability).

8. *Campbell Soup Co. v. Wentz*, 172 F.2d 80 (3d cir. 1948).

9. *Niemiec v. Kellmark Corp.*, 581 N.Y.S. 2d 569 (City Court, N.Y., Erie County, 1992).

10. See, e.g., Paul Burrows, "Analyzing Legal Paternalism," *International Review of Law & Economics* 15 (1995): 489–508 at 489, 501 (taking unconscionability as a prototypical case of legal paternalism); Gerald Dworkin, "Paternalism," in Rolf Sartorius, ed., *Paternalism* (Minneapolis: University of Minnesota Press, 1983), pp. 20–21 (arguing that paternalism involves interference with or restrictions on liberty and citing laws regulating which voluntary contracts are valid as examples of 'existing restrictions on liberty'); David Shapiro, "Courts, Legislatures, and Paternalism," *Virginia Law Review* 74 (1988): 519–75, at 535–37 (characterizing unconscionability as a paternalist doctrine but noting judicial reluctance to deploy it); Michael Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993), pp. 162–63; Robin West, "Taking Preferences Seriously," *Tulane Law Review* 64 (1990): 659–703 at 695 (citing two unconscionability cases, *Henningsen v. Bloomfield Motors* and *Williams v. Walker Thomas Furniture*, as "our two classic instances of paternalism in contract law"); Eyal Zamir, "The Efficiency of Paternalism," *Virginia Law Review* (1998): 229–86 at 230, 242–43; Eyal Zamir, "The Inverted Hierarchy of Contract Interpretation and Supplementation," *Columbia Law Review* 97 (1997): 1710–1803 at 1785–88. See also Eric Freyfogle, "The Installment Land Contract as Lease: Habitability Protections and the Low-Income Purchaser," *New York University Law Review* 62 (1987): 293–319 at 304 (describing courts' refusal to enforce harsh installment contracts as "a wave of paternalistic protection"); Eric Posner, "Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract," *Journal of Legal Studies* 24 (1995): 283–319 at 296–97 (reporting a "widespread feeling among contract law scholars that paternalistic attitudes account for some judges' use of the unconscionability doctrine" but defending the unconscionability doctrine as promoting the welfare system's goals).

accuracy of this characterization, disputants over the unconscionability doctrine tend to contest whether 'paternalism' is universally and properly a term of derogation. For supporters of the unconscionability doctrine like Duncan Kennedy and Anthony Kronman, some well-exercised paternalism is acceptable and desirable;¹¹ for its opponents, such as Charles Fried and Alan Schwartz, this label suffices to close the case against the unconscionability doctrine.¹²

This article aims, in part, to redraw these battle lines by defending the unconscionability doctrine without embracing paternalism. I agree with many of its opponents that paternalist doctrines and policies convey a special, generally impermissible, insult to autonomous agents. But I disagree that unconscionability doctrine must be defended on paternalist grounds or applied in a paternalist way. In Section I, I will contend that the characterization of the unconscionability doctrine as paternalist reflects some common but misleading thought about paternalism. To support this contention, a fair portion of this part of the article will contain a general discussion about what paternalism is and why the issue matters. Clarifying the charge of paternalism is important both because the charge can be morally significant and because its misapplication, over time, tends to deflate and distort its force. In addition, I believe that confusion about paternalism tends to camouflage and deflect attention from, among other things, a distinct set of concerns about social interconnection and the social protection of autonomy. So, while the issues about the unconscionability doctrine are interesting and important in

11. See Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power," *Maryland Law Review* 41 (1982): 563–658; Duncan Kennedy, "Law-and-Economics From the Perspective of Critical Legal Studies," in Peter Newman, ed., *The New Palgrave Dictionary of Economics and the Law*, vol. 2 (New York: Stockton, 1998): 465–74 at 472; Antony Kronman, "Paternalism and the Law of Contracts," *Yale Law Journal* 92 (1983): 763–98 at 764. See also P. S. Atiyah, "Contract as Promise," *Harvard Law Review* 95 (1981): 509–28 at 526; Burrows, "Analyzing Legal Paternalism," at 501–8 and passim; West, "Taking Preferences Seriously," at 695–98; Eyal Zamir, "The Efficiency of Paternalism," passim; Zamir, "Inverted Hierarchy," at 1785–88.

12. See Charles Fried, *Contract as Promise* (Cambridge, Mass.: Harvard University Press, 1981), pp. 104, 152; Alan Schwartz, "A Reexamination of Nonsubstantive Unconscionability," *Virginia Law Review* 63 (1977): 1053–83 at 1071–76. See also Arthur Allen Leff, "Unconscionability and the Code—The Emperor's New Clause," *University of Pennsylvania Law Review* 115 (1967): 485–559 at 556–58 (1967); and Leff, "Unconscionability and the Crowd—Consumers and the Common Law Tradition," *University of Pittsburgh Law Review* 31 (1970): 349–59.

themselves, they are also worth revisiting because they provide a useful springboard for tackling these larger, more systemic concerns.

The defense of the unconscionability doctrine that I offer in Section I aims to answer the charge of paternalism in a way that, primarily, addresses what I take to be the concerns of many libertarian critics of the unconscionability doctrine. This defense will also, along the way, provide some resources to respond to another, distinct line of criticism: that the unconscionability doctrine is an inappropriate, because economically inefficient, tool with which to pursue egalitarian aims. In Section II, I will suggest that while the defense offered in Section I may appeal to non-libertarian, liberal defenders of the unconscionability doctrine, its endorsement raises some unique problems for liberals, given their approach to the norms governing the social protection of autonomy. These problems are distinct from, but often obscured by, worries about paternalism. They concern the scope of accommodation we should provide each other to support and make possible fully meaningful autonomous activity. The issues I will highlight in this section are not unique to the unconscionability doctrine or, for that matter, to contracts more generally. They recur throughout political and constitutional theory—in thinking about such things as health-care provision, the structure of subsidies, and the accommodation of religious activity, to cite a few. Although I will not be treating these issues in full here, I will argue that they should command more of the liberal autonomy theorist's attention. I will end by suggesting how the unconscionability doctrine, in particular, might be considered within this different framework.

I. IS THE UNCONSCIONABILITY DOCTRINE REALLY PATERNALIST?

In this section, I first identify the issue about paternalism and the unconscionability doctrine that I will address. Then, in a second stage, I discuss some problems with common accounts of paternalism. I introduce a broad motive-centered conception of paternalism. This more general discussion frames the subsequent argument, in the third stage, that the unconscionability doctrine is not intrinsically paternalist.

A. Setting the Scene

To begin, it will be useful to distinguish the approach I plan to take from a more common defense of the unconscionability doctrine. Some argue

that unconscionable contracts are not really the products of free agreement and that the unconscionability doctrine aims to protect people from decisions that were not (truly) freely made.¹³ On this understanding, the unconscionability doctrine is an extension of protections against duress or fraud, or an amalgam that catches cases of procedural imperfection that fall between the cracks of the duress and fraud doctrines.¹⁴

This defense has much power, especially as a description of which claims tend to be successful. It gains some support from the fact that some degree of procedural irregularity in the transaction, also known as ‘procedural unconscionability,’ is often a component of successful unconscionability claims. This is not the defense that I will pursue, though: in part, because disputes about which agreements are *truly* voluntary often reach an impasse, and, in part, because there is a distinct defense worth pursuing. I will defend so-called ‘pure substantive unconscionability’—that is, the doctrine that independent of whether there are procedural defects in the contract’s formation that taint a transaction’s voluntariness, a contract’s terms may themselves be so oppressive or unfair that they warrant a court’s refusal to enforce them.

To distinguish this defense from defenses that emphasize a contracting party’s lack of freedom, I will assume that these contracts are made voluntarily, by responsible agents, and under conditions of sufficient information. Moreover, to share as much ground as possible with critics of the unconscionability doctrine, I will also suppose that a ‘will’ theory of promising, of or like the kind advocated by Charles Fried, is true.¹⁵ Many opponents of the unconscionability doctrine favor this view of promising. Roughly, the will theory holds that promises bind when they are

13. The unconscionability doctrine might also be defended on the grounds that it enacts a protection that we, as self-interested agents, want for ourselves. It may provide insurance against our falling subject to severely disadvantageous terms should we find ourselves in a poor bargaining situation. Although I think this defense has promise, I want to put it aside as well. For my purposes, suppose that many agents do not care to insure in this way because they believe the probability of being in such a position is sufficiently unlikely or because they believe they could negotiate decent terms.

14. See, e.g., Richard Epstein, “Unconscionability: A Critical Reappraisal,” *Journal of Law and Economics* 18 (1975): 293–315 (arguing for a limited construal of the unconscionability doctrine to protect against a narrow class of cases of fraud, duress, and incompetence); Joel Feinberg, *Harm to Self* (New York: Oxford University Press, 1986), pp. 246–53; Robert Hillman, “Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2–302,” *Cornell Law Review* 67 (1981): 1–44, at 7.

15. Fried, *Contract as Promise*, pp. 7–28.

made by autonomous people under suitable conditions, such that the promise is the free expression of that person's will. Agents are morally bound to carry out their promises (assuming that compliance would not wrongfully harm or otherwise interfere with third parties). They are bound just because they have made a commitment, whether or not the promisees have relied to their detriment on the promise. Interference with the discharge of this commitment simply because the promise is to the detriment, even the severe detriment, of the promisor would bespeak a lack of respect for her autonomy and responsibility. Such interference reeks, so it is suggested, of unjustifiable paternalism.

Opponents of the unconscionability doctrine often suggest that the will theory of promise yields a like-minded view of contract. Because they are autonomous, parties should be free to enter into any sort of contracts they choose (assuming they have negligible effects on others). If a breach occurs, the state must enforce such contracts, regardless of their content. To refuse to enforce a contract on the grounds that its terms are outrageous or excessively favor one party interferes with the contracting relation and disrespects the autonomy of the freely contracting parties in a paternalist way.

Concerning this charge, one might ask: toward whom is the doctrine's application paternalist? The party who invokes the unconscionability doctrine actively opposes enforcement of the contract. How then could rescission be paternalist since that is what the putatively protected party wills? Unlike many of the commonly cited examples of paternalism (such as drug prohibitions or seat-belt laws), the putatively protected, benefited agent does not resist or oppose the result or the procedure enacted by the paternalism. Here, the relevant agent actively endorses the supposedly paternalist conduct. This may seem puzzling.

Of course, it should not seem so puzzling to the staunch will-theorist: for on the will-theory of promising, one's will is set by and then constituted by one's promise. One's later preference that one had not committed oneself is not sufficient to alter one's bound will. The doctrine would be paternalist toward the promisor, on this account, because it opposes his will in order to protect him; it opposes his will, even though it does not run counter to his current preference. Most likely, though, this explanation will only remind the die-hard will-theorist of his views about the will. It is less likely to convince others who are puzzled about the paternalism of the unconscionability doctrine.

A further, more general case for the doctrine's paternalism (one I hope later to dismantle) does not depend upon any special views about the constitution of the will. One might say first that voiding the contract treats the *ex ante* contractor paternalistically. The doctrine's application in his case prevents him from making a *binding* contract that he actively wills on the grounds that, in some serious way, it does not promote his interests to be bound or to comply. Moreover, the doctrine's deployment will deter the formation of other, like contracts in the future. One can easily see the putative paternalism in these deterrent effects: future, would-be contractors will not have the opportunity to make these contracts. This opportunity will have been foreclosed for their putative benefit.¹⁶

Indeed, as I earlier noted, even friends of the unconscionability doctrine describe it as paternalist. Both Duncan Kennedy and Anthony Kronman characterize the unconscionability doctrine as a form of paternalism, albeit justified. Anthony Kronman, for instance, characterizes limitations on freedom of contract such as the warranty of habitability, the refusal to enforce contracts of peonage, or voluntary enslavement, and the unconscionability doctrine as paternalist and "liberty-restrictive" because they limit the "*liberty* to bind oneself by making a legally enforceable promise" or, as he earlier puts it, "the *right* to decide whether [one's] voluntary arrangements are legally binding."¹⁷

B. Characterizing Paternalism

To evaluate this argument that the unconscionability doctrine is paternalist, it will help to clarify what paternalism involves—a difficult task. Unsurprisingly, the literature on paternalism contains a variety of explicit and implicit conceptions of paternalism. Some emphasize the effects of a paternalist act and suggest, roughly, that paternalism involves the restriction of an agent's freedom that nonetheless benefits the agent. Other

16. There is a further (less standard) sense in which the doctrine may be seen as paternalist—ironically, toward the plaintiff (or whoever happens to be seeking enforcement). On the account of paternalism I will articulate, paternalism may transpire when the state (or another party) substitutes what it regards as superior judgment concerning, among other things, aspects of one's moral conduct that lie squarely within one's domain of autonomy. By voiding the contract, the state might be understood to suggest that the plaintiff has not exercised adequate moral judgment toward the defendant. When the defendant has consented to this treatment, this sort of intervention may appear to be an intrusion into the plaintiff's relationship with the defendant and into the plaintiff's domain of autonomy.

17. Kronman, "Paternalism and the Law of Contracts," at 764 and 763, respectively.

characterizations place more emphasis on the paternalist's motive. They understand paternalism to involve some sort of resistance to an agent's will or interference with an agent, motivated by concern for the agent's welfare.

It is difficult to know how to adjudicate between competing characterizations of paternalism. One plausible approach, I would suggest, involves not merely testing formulas against intuitions, but also testing formulas with an eye to arriving at a conception of paternalism that fits and makes sense of our conviction that paternalism matters. That is, it seems worthwhile to assess what is central in our normative reactions to paternalism and to employ a conception of paternalism that complements and makes intelligible our sense of paternalism's normative significance. In this section, I propose to follow this method, albeit in an abbreviated and sometimes indirect way, to work through some common characterizations of paternalism. I will suggest that many familiar characterizations of paternalism deploy overly narrow criteria that draw somewhat arbitrary and unmotivated distinctions between cases; that is, they draw distinctions that do not seem to have much normative significance in light of what seems to be the driving force behind our aversion to paternalism.

I will propose a motive-based characterization of paternalism that is significantly broader than most standard construals. Yet even on this broad understanding, the unconscionability doctrine need not be paternalist. I should note, though, that the defense of the unconscionability doctrine that I will pursue does not depend on my particular characterization of paternalism; it could be deployed with many other characterizations in mind. Nonetheless, I believe the question of how to characterize paternalism and its significance is inherently worth pursuing. Moreover, the investigation is relevant to the more immediate inquiry. Clarifying what paternalism is involves considering why paternalism matters. And, it seems crucial to defending the unconscionability doctrine that we keep an eye not only on the formal criteria of paternalism but also on whether the defense is responsive to the underlying motivations of the objection.

I will begin by discussing some possible characterizations of paternalism that focus on the effects or other characteristics of paternalist action, apart from its motive.

Clearly there is some strong connection between paternalism and free-

dom, but the connection is not straightforward. Obviously, not any violation or restriction of an autonomy right is paternalistic. If A murders B for profit, or if, to bully B, A obstructs B's ability to walk freely down the street, A violates B's autonomy right, but does not act paternalistically. I will, later, argue that the failure to enforce unconscionable contracts does not, in fact, violate an autonomy right. Still, it is further worth noting that the violation of a distinct autonomy right is not even a necessary condition of paternalism.¹⁸ For that matter, although it is sometimes suggested that paternalist acts involve active interference with liberty or a diminution of freedom, I think this is inaccurate. Paternalism can occur through an omission, even a non-freedom-diminishing omission. Consider the following example: Suppose B has no valid claim to A's assistance but asks A, an acquaintance, for help building a set of shelves. A refuses, but not because A is too busy or disinclined to help. In fact, A is eager to deploy her carpentry skills. She declines on the grounds that B too often asks for assistance to his own detriment: he is failing to learn for himself the skills that he needs, or perhaps he displays unwarranted insecurity in his own skills. If A voices these reasons and persuades B to do it himself, her persuasive efforts and her subsequent abstention would not be paternalist. But were A just to refuse baldly to help for those reasons, then it seems to me that A's omission would be paternalist—even though it is a legitimate exercise of A's autonomy right, violates no distinct right of B's, and does not, in any meaningful way, diminish B's freedom.

Why does the case of persuasion differ from the mere refusal to assist? I suggest it is because in the former case A provides reasons to B, appealing to B to change his mind and to exercise his agency in another way. By engaging with B's capacities and showing respect for B's power to decide what to aim for, A respects and engages with B's agency and does not attempt to supplant it. By contrast, by refusing to help for the reasons she does, A substitutes her judgment for B's about what B should aim for and works around B's agency to get B to act as A believes would be better for B. This substitution of judgment and the circumvention of an agent's will seem to be central aspects of what is distinctive and worrisome about paternalism. And, this maneuvering can transpire through an omission, not just through action. Further, the manipulation need not result in a restriction on liberty or a failure to fulfill a right.

18. See also Bernard Gert and Charles Culver, "Paternalistic Behavior," *Philosophy & Public Affairs* 6, no. 1 (Fall 1976): 45–58.

From this perspective, even some freedom-enhancing behavior can be paternalist. Suppose A creates opportunities or presents choices for B, with B's welfare in mind, that B has explicitly declared he would prefer not to have. B finds too much choice overwhelming or worries about yielding to temptation. A provides these opportunities in ways, however, that are perfectly legitimate exercises of A's freedom and that do not infringe any of B's autonomy rights or personal boundaries. If A provides these opportunities solely because she believes that B has mistakenly cabined himself off or would develop a better character if he were tested, then I think A's behavior is paternalist even though it enhances B's freedom, at least in one sense, by expanding her range of choices.¹⁹ Here again, A forcibly substitutes her judgment about the right way for B to exercise and develop her agency.

One might, then, try to characterize paternalist behavior as behavior that is contrary to an agent's will but may be expected to promote her interests or avert harm to her.²⁰ A little later, I will challenge the idea that paternalist behavior must promote or aim to promote the agent's own interests. But first I want to register a worry with the idea that paternalist behavior must be contrary to the agent's occurrent will. One may behave paternalistically by acting before an agent has considered a matter or established an intention. Suppose one believes, or merely worries, that an agent will mull it—confronted with a certain choice, he may make the wrong call or succumb to temptation. To prevent the agent's imprudence, one might make the decision for him before he confronts the choice. One might, for example, intercept a credit card offer that arrives in the mail and rip it up, to preclude the addressee's unwisely subjecting himself to punishing interest rates. (Or, courts may enact contract doctrines with an eye to deterring future offers and to protecting potential, future promisors from poor decisions, although they have yet to contemplate making them.) In such cases, it seems the interceptor has acted paternalistically, even if she acts before the agent is aware of the matter and, even if, later, the agent has no substantive objection to the outcome the paternalist selected.

19. Could we say that because B prefers fewer options, one has limited his freedom by providing more options? We would then have a hard time making sense of the idea that some agents prefer less to greater freedom. In any case, even were the provision of greater options properly construed as freedom-diminishing in this case, the example would show that the class of paternalist behaviors is wider than is commonly thought.

20. See Richard Arneson, "Mill v. Paternalism," *Ethics* 90 (1981): 470–489.

Examples of these sorts suggest that there may be no hard and fast features of the effects or expected outcomes of all paternalist behaviors. The same outcome may be produced by paternalist behavior or non-paternalist behavior, depending on the actor's motive. It is one thing for A to refuse to help with the shelves because she is busy or resents being taken advantage of. It is quite another if she refuses in order to force B to challenge himself. Paternalism seems to involve, necessarily, a certain motive, but characterizing it is tricky.

Frequently, I believe, motive-centered accounts describe the paternalist motive too narrowly. Motive-centered accounts often describe paternalism, roughly, as behavior that involves substitution of the paternalist's judgment for the agent's judgment where the paternalist is motivated by concern for the welfare of the agent and a sense that the agent's judgment of her own interests is untrustworthy or inferior.²¹ This description seems overly narrow in two respects.

First, the motivation for paternalist behavior may instead be that the agent acted upon has an untrustworthy, compromised, or inferior ability to *act* to secure his properly perceived interests. He may agree that he should quit smoking. Sometimes he is weak-willed. If an acquaintance hides his cigarettes from him without consent (or other encouragement), it seems that the acquaintance acts paternalistically, even though the acquaintance and the weak-willed quitter have no disagreements about what outcomes lie in the quitter's best interests. Strangely, many accounts of paternalism focus exclusively on disagreements between an agent and a paternalist about the agent's perception of what is in her good. Yet it seems that efforts to supplant or maneuver around an agent's agency when motivated by distrust of that person's agency, can deliver the same sort of insult to her autonomy as distrust of her judgment.²²

Second, I believe that traditional accounts of the paternalist motive misstep by insisting that the paternalist be motivated by concern for

21. See, e.g., Shapiro, "Courts, Legislatures and Paternalism," at 535; Kennedy, "Distributive and Paternalist Motives," at 572.

22. I suspect that the standard preoccupation with an agent's judgment of the good is connected to the prominence of characterological accounts of autonomy's value. Many accounts of autonomy focus on the unity of an agent's character and his endorsement of his values, aims, and desires. Less emphasis is placed on the significance of his having the ability and freedom to engage in the implementation and pursuit of these affirmed aims—which is to say that on these accounts, the *agency* of the agent and his connection to the external world are disappointingly neglected.

the interests or welfare, more broadly construed, of the paternalistically treated agent. Here I will advance an admittedly unusual claim. (Its defense is not essential to my main thesis, but calling attention to it highlights why paternalism matters.) Behavior may be paternalist if the motive behind it is simply that the (putative) paternalist knows better than the agent, or may better implement, what the agent has authority for doing herself. An action may be paternalist, I submit, if it involves a person's aiming to take over or control what is properly within the agent's own legitimate domain of judgment or action. Typically, this domain is larger than the pursuit of the agent's own welfare, even when the notion of welfare is broadly construed.

For example, it seems that A may act paternalistically toward B if A interferes with B's legitimate power to decide matters concerning another party, C. This seems quite clear when A's motivation is to protect B. But I think it is true even if A's motivation is concern for C (not B) and A distrusts B's judgment or her capacity to implement B's legitimate powers to decide for C. It is often noted that A may act paternalistically toward B by acting indirectly through a third party, for example, by bribing D not to fulfill B's imprudent requests.²³ But I am suggesting, further, that the paternalist may be solely and directly concerned with the third party's welfare. Suppose B is the legitimate, duly appointed manager of a group of workers. A substitutes a policy memo that A has written for a memo of B's—not from concern for B's welfare, but from concern for the workers that B manages. A believes that her memo is clearer or establishes a better policy. I am assuming that A does not mean to challenge B's legitimate authority or her position. She does not act from the idea that B has no business being the manager or that B's incompetence undermines B's claim to legitimate authority over the workers. A is not initiating a coup. (To be clear, if A were acting on the grounds that B had no real claim to authority at all, that would not, I think, be paternalist.) A just acts from the motive that A could write a better memo and it would create a better environment for the workers. In such a case, I think A behaves paternalistically toward B even though B is not the object of A's concern. A's behavior is paternalist because she takes over B's domain of action on the grounds that she treats her judgment about matters under B's purview as superior.

23. See e.g., Dworkin, "Paternalism," at p. 22.

Here is another example: Suppose a park ranger has the power to refuse permission to climb a steep, dangerous mountain path. If the ranger refuses to allow a person to climb simply because the (fully informed, competent) person might hurt himself and that would be bad for him, that refusal would be paternalist, I think. Suppose the ranger says, "Of course, you may take whatever risks you want with your life, but I refuse permission because you might die and leave your spouse grief-stricken." Such a refusal also seems paternalist. The ranger is substituting his judgment about how the climber should treat her spouse and conduct her marriage. The ranger is taking over the climber's marriage, a bit, on the implicit grounds that his moral judgment of how to conduct the relation is correct and the climber's is incorrect.

Indeed, from this broad perspective, a paternalist motive need not concern any person's welfare at all. Suppose an interlocutor raises his hand at a talk. He is called upon and just as he haltingly begins to articulate his point, an excited, sympathetic colleague loses self-control and interjects: "Isn't this a better way to put the point?" She goes on to drown him out while cleverly and eloquently articulating his point. She takes over his question because she feels she has a better command of it than he does. I think her taking command over his question for this reason makes her action paternalist, even if her motive is really that she wanted to see the point formulated properly and not that she wanted in particular to help *him* formulate the point or to make *his* point understood.

Of course, such situations are subtle ones to interpret. If he has been stammering for some time or his point has been misunderstood through a few cycles of back and forth, the intervention may be proper, even welcome, and designed to move the conversation along, for the benefit of everyone. In the collective enterprise that talks represent, at some point, one loses legitimate, exclusive control of the floor. But if the intervention occurs, as initially described, quite early in the colloquy, the colleague's intervention seems paternalist. So it seems that paternalism may occur when a person's concern is to ensure that a project or aim is acquitted properly, if she pursues this concern by substituting her perceived superior judgment or agency for that of the agent who has legitimate control over the project.

Admittedly, most accounts of paternalism do not encompass this sort of behavior in their characterizations (although our common speech patterns are sometimes more expansive in just this way). But, it is unclear

why we should draw such a bright line here, separating the cases so sharply. For example, both of the cases with the ranger involve an effort on the ranger's part to assert her will over a domain in which the ranger does not have (or even assert) legitimate authority on the grounds that her judgment is superior. Both cases seem to involve the same sort of intrusion into and insult to a person's range of agency. Some may insist that "paternalism," strictly speaking, applies only to the case in which the ranger forbids the climb from concern for the climber. But, it seems that we should have the same sort of normative reaction to the case in which the ranger forbids the climb from concern for the spouse. What concerns us about paternalism, narrowly construed, should spark the same concern about these closely related, similarly motivated cases. It seems arbitrary to single out paternalism, narrowly construed, as a special normative category. This consideration, coupled with my intuitive reactions to these cases, propels me to endorse a broader understanding of paternalism that encompasses the similar cases. Others may, of course, remain unconvinced and plump for one of the narrower conceptions. Which way one is inclined here will not affect the argument that follows about the unconscionability doctrine. Although, those who favor more narrow analyses should, I believe, be more sensitive to whether the laws involve the broader range of closely related normative phenomena to which I call attention.

So, I suggest that paternalism by A toward B may be characterized as behavior (whether through action or through omission)

- (a) aimed to have (or to avoid) an effect on B or her sphere of legitimate agency
- (b) that involves the substitution of A's judgment or agency for B's
- (c) directed at B's own interests or matters that legitimately lie within B's control
- (d) undertaken on the grounds that compared to B's judgment or agency with respect to those interests or other matters, A regards her judgment or agency to be (or as likely to be), in some respect, superior to B's.

On this characterization, given (c), a full account of paternalism will depend on an account of what sorts of interests and matters legitimately lie within an agent's control. That is, a full account of paternalism will depend upon a fleshed-out account of autonomy rights—over what an

agent (B) generally has proper domain, just in virtue being an agent. It will also depend on other theories of how specific agents come to gain proper domain or authority over specific matters—how they gain special rights, such as managerial rights, parental rights, and property rights, for example.²⁴

But, although the characterization of paternalism that I am suggesting depends on an independent specification of an agent's rights, paternalist behavior cannot be reduced to some subset of behavior that violates these rights. For it is possible for A to act within her own rights, but be motivated purely by a disrespect for B's agency about matters that lie within B's purview and aim to maneuver around or manipulate B's agency. When this is A's sole motivation, she behaves paternalistically, I think, even if her behavior does not violate any distinct rights, as the carpentry and mountain-climbing examples are meant to illustrate.

This account of paternalism can accommodate the variety of morally interesting cases that seem to involve paternalism but do not feature all the standard players of stock examples, such as: action (as opposed to omissions), direct interference, violation of autonomy rights, diminution of freedom, or concern for the well-being of the agent. In addition, it gives

24. As I have noted, most accounts, unlike mine, require the paternalist to aim at the agent's welfare. One possible explanation for this exclusive focus on the agent's welfare may trace to the liberal consensus that competent adults have proper domain over their own interests. By contrast, the other rights and powers agents have vary among them and are often more contested; hence, they do not serve well as ready examples. On this explanation, then, we would understand the first clause of (c), referring to interests, as specifying an especially prominent subset of the second clause's appeal to 'matters legitimately' within an agent's control. This interpretation, though, would render it a strained, or extended, use, to say that substituting one's judgment for a child's, or for a mentally disabled person's, is paternalist, since children and the mentally disabled do not have full legitimate authority over themselves. This may seem terribly counter-intuitive to those who regard our treatment of children and mentally disabled people as paradigm cases of justified paternalism. I do not find this result so jarring, though, since our moral interest in the *concept* of paternalism stems from an interest in how we may permissibly treat fully competent agents in order to further the good—when, if ever, our perception that we could achieve much good warrants treating adults the way we treat children. In any case, I do not think that there is much of substance at dispute here. I agree that substitution of judgment for children and the mentally disabled is often warranted, whether or not we call it a type of paternalism. (Those who insist that our treatment of children is paternalist might nonetheless adopt the account under a different interpretation. They might read the two clauses as separate and distinct, instead of the first's being a specification of the second. Then, as it stands, the account would find substituted judgment toward children and the mentally disabled paternalist when one substituted one's judgment so as to better achieve their interests.)

explicit emphasis to the motive behind paternalism. The motive, I think, is what is central to accounting for why paternalism delivers a special sort of insult to competent, autonomous agents. Even when paternalist behavior does not violate a distinct, independent autonomy right, it still manifests an attitude of disrespect toward highly salient qualities of the autonomous agent. The essential motive behind a paternalist act evinces a failure to respect either the capacity of the agent to judge, the capacity of the agent to act, or the propriety of the agent's exerting control over a sphere that is legitimately her domain. Even if no distinct autonomy right is violated, the paternalist's attitude shows significant disrespect for those core capacities or powers of the agent that underwrite and characterize his autonomous agency. This disrespect is distinct from the insults often delivered through violations of an agent's autonomy rights or the diminution of an agent's freedom; an autonomy right may be violated inadvertently, showing negligence but not an affirmative devaluing of the agent. Or, a right may be violated because the transgressor values her or others' own well-being more than the agent's. Paternalistic behavior is special because it represents a positive (although often sometimes unconscious or sometimes caring) effort by another to insert her will and have it exert control merely because of its (perhaps only alleged) superiority. As such, it directly expresses insufficient respect for the underlying valuable capacities, powers, and entitlements of the autonomous agent. Those who value equality and autonomy have special reason to resist paternalism toward competent adults.²⁵

25. Does it follow definitionally from the account that I offer that paternalism can never be justified? If paternalist behavior involves interference with or maneuvering around the agent's *legitimate* sphere of control, does it follow from the notion of legitimacy that such behavior must be wrong? I do not think that this account *definitionally* implies that paternalism is necessarily, all-things-considered wrong. It may follow from the account's appeal to matters legitimately within an agent's control that paternalism, so understood, is *pro tanto* morally problematic. But whether it is always all-things-considered wrong will depend upon, among other things, one's view about how stringent (some) rights, and other forms of legitimate control, are, and how much weight they exert against the prospect of mistakes that may involve high levels of foregone welfare or other sorts of realized value. Some may think that (some) rights, or other forms of legitimate control, may be disrespected when a great deal is at stake. Others may disagree and think that rights and other forms of legitimate control are insurmountable, *per se*, or at least as against the paternalist's sort of reasons. There may also be dispute, in some cases, about whether non-right-violating forms of paternalism are as morally significant as forms of paternalism that directly violate distinct rights. The suggestion I am making, that the account leaves *logical* room for dispute about the justifiability of paternalism, does rely upon a conception of the

C. Unconscionability Doctrine and Paternalism

This account of paternalism is, for the most part, more expansive than most. Nonetheless, even when coupled with the will-theory of promising, it does not straightforwardly support the characterization of the unconscionability doctrine as paternalist. The basic moves I will make are these: first, the legal institution of contract requires, through their role in enforcement, the participation and cooperation of parties outside the agreement — that is, it requires the cooperation of the community, as it is embodied in the state; second, potential promisors do not have a right to the community's unqualified assistance; and, third, the community might refuse to provide its cooperation on grounds that were not paternalist.

I want to begin by taking it for granted that the institution of contract is an institution in which the community assists people who make agreements by providing a measure of security in those agreements. We may provide this assistance to one another for many reasons. Primary among them is that the institution facilitates agreements and transactions between strangers as well as people who lack a sufficient basis for an independently generated mutual trust. This allows us to cooperate more easily and to secure our common welfare in a number of respects. It also permits individuals to pursue more-complex projects and plans and to act more independently. These opportunities enhance the value of their capacity for autonomy. Of course, the existence of such an institution may well affect what agreements are made, so one should not necessarily regard all agreements regulated by a system of contract as conceptually prior to or independent of the existence of the institution. Some will be made only because there is a background institution providing such security. Others would be made regardless. Given this conception, the questions relevant for our inquiry are: whether it is reasonable to construct the institution such that its terms of assistance are qualified and provide security for only some of the voluntary agreements people may wish to make, and whether our rationale for supporting a qualified institution could reasonably be construed as non-paternalistic.

The second stage of the argument contends that a commitment to the

general scope of rights and other forms of legitimate control. This conception allows for the logical possibility that rights, for example, may be overcome and still be thought of as rights; that is, the cases in which the claimed right, for example, does not, all-things-considered win the day, are not 'written into' the concept of the right.

will-theory of promising and to the value of autonomy does not commit us to providing this cooperation and surely not in an unqualified way. We are not compelled to further (or to make possible) the projects of promisors, just because those agents act freely. We may agree that autonomy underlies the fact that promises bind, that the capacity for autonomy is among the most morally significant features of a person, that the exercise of autonomy must be protected and respected, and that the practice of promising is a significant arena for the exercise of autonomy and the cultivation of trust. Very little follows from these claims with respect to the legal institution of contract and the details of its doctrines. Respect for autonomy may entail, other things being equal, that unaffected parties should not interfere with the formation or execution of voluntary promises. But unless we assume that one must ensure that others' obligations are met, the promisor's genuine responsibility does not entail that unaffected parties or the community at large must take it upon themselves to enforce promises. Neither does it entail that they must undertake such enforcement through the forceful means and resources of a legal system. Because her commitment was freely assumed, a breaching promisor may be accountable, the proper subject of blame, and perhaps even liable to suitable, proportionate enforcement measures at the hands of the promisee and those willing to aid him. The promisor might make an autonomous commitment that could justifiably be enforced, but this does not, by itself, obligate others to aid the promisee.

Indeed, if the mere fact of a commitment did generate obligations in other, uninvolved parties, then promisors would have a terrific power over others. Such power would represent a complementary, substantial threat to the freedom and autonomy of external, uninvolved parties. Their projects would be vulnerable to significant disruption if, merely by making and receiving promises, promisors could generate substantive obligations in others to provide assistance in furthering the promisors' distinct (and perhaps substantively conflicting) projects.

Another example may help. If B freely promises *x* to A, then, other things equal, B is morally required to provide *x* to A. If B fails to provide *x*, she would have no complaint if *x* or its monetary equivalent were taken from her on behalf of A (assuming due process); nor would B have a valid complaint if she were to suffer injury to her reputation, or if others were reluctant to enter into agreements with her in the future. But if A has not relied on B's promise to her significant detriment, then it is not clear why

C, a third party (or why the community, full of uninvolved parties) must use his energy and force (or its threat) to compel B to deliver. Not all moral obligations and wrongs are so significant that they make others' assistance or threats of force required or even appropriate.²⁶ Of course, if the promisee has significantly relied on the promise or will otherwise suffer harm from the breach, that supplies reason for C to lend her energies to enforcement. But the mere fact that B is responsible does not alone compel C's assistance or intervention. In other words, we might distinguish between what makes a promise binding and whether (and to what degree) it is morally important that it be kept. The latter is pertinent to our judgments about when others should engage in enforcement actions, not only the former. The will theory only specifies conditions of a promise's bindingness, not its further value.

This places us in a position to see why it need not be paternalist for the state to refuse to enforce an unfair agreement. As I earlier suggested, contract law operates *writ large* to facilitate the formation and execution of agreements; in an enforcement action, the state is being asked to assist two (or more) parties to complete a deal or to provide security that the deal will transpire as planned. The state may often, and perhaps should often, assist parties who make agreements. Its motivation for providing such assistance may be, in part, to create a supportive environment for such agreements and for the development and expression of autonomously formed aims. But viewing autonomous agreements as worthy of respect does not entail relinquishing one's own capacities to exercise independent moral judgment or to set distinct priorities for action. If one is asked to facilitate the enforcement of such agreements, one may refuse for a variety of reasons: e.g., one is busy, one has more valuable things to do, one does not want to be involved in the projects of others generally, or one does not want to be involved in these specific projects. In deciding whether to join the endeavor of others, it is often permissible to consider its content. Without indicating disrespect for another's autonomy, one may refuse to devote one's own energies to further her immoral deal—just as if one had been asked to be a party to the agreement, one

26. See e.g., *Love v. Harvey*, 114 Mass. 80, 82 (1873) (refusing to settle a contract dispute arising from a bet because "[i]t is inconsistent alike with the policy of our laws and with the performance of the duties for which courts of justice are established that judges and juries should be occupied in answering every frivolous question upon which idle or foolish persons may choose to lay a wager.")

might have refused on grounds that the content was itself immoral or unfair. Even were respect for autonomy to require noninterference with voluntary, but unconscionable, agreements, it would not necessitate assistance in making and implementing them.

This posture of selective involvement or selective non-enforcement need not be motivated by *distrust* of either parties' ability to judge what is in their good (or the good of those under their control) or to act to secure their good. The refusal to enforce need not represent an effort to supplant the judgment or action of the contracting parties or an intention to stop them from engaging in (solely) mutually regarding immoral action. (Such efforts *would* be paternalist, on my account). Instead, the motive may reasonably be a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action. Put metaphorically, on moral grounds, the state refuses, for its own sake, to be a codependent. Consider a parallel case: it would be paternalist for me to hide your cigarettes to protect your health. Nonetheless, it would not be paternalist (and may be morally required) for me to refuse to buy you cigarettes or to refuse to retrieve them from a pilfering acquaintance if my motive for refusal is that I think that *I* should not perform substantial actions that contribute to your addiction or illness. An analogous claim may be made with contract: there are some agreements you have a right to form but no right to assistance in carrying them out and about which others may reasonably feel that they may or even must not assist.

To illustrate, we might fruitfully distinguish several sorts of cases involving voluntary agreements. I describe and discuss these cases below. The arguments of many unconscionability opponents seem implicitly to lump these cases together, tarring them all as paternalist. I believe there are serious differences among them. Only the first two cases strike me as classic examples of paternalism that the will-theory and other autonomy-protecting theories rightly condemn. The second two are more complex but should be classified as paternalistic. The fifth case (what I will call Self-Regarding Refusal), does not seem to involve paternalism and provides a model for a nonpaternalist approach to the unconscionability doctrine.

In the cases that follow, A and B propose to make a deal, one that will affect A and B without imposing significant costs on other parties. In some cases, they ask C, an uninvolved party, for assistance in making the deal or in providing security that the deal will transpire as planned:

1. *Intervention*: C (an uninvolved party) intervenes to prevent A and B from making or implementing the agreement between A and B because C believes the deal seriously harms B.
2. *Fines*: C makes carrying out the agreement difficult by imposing fines or otherwise burdening its implementation because C believes the deal seriously harms B.

Both cases seem to involve paternalism because C acts to obstruct the parties' agency, C is motivated by distrust in B's judgment about himself, and C substitutes his own judgment for B's. Now consider a third case:

3. *Refusal for B's Benefit*: A and B ask C to assist them in their endeavor, claiming that C's participation is essential. C believes the deal would harm B and that B should not agree to it. But C does not think that A was wrong to make the offer or that A is treating B disrespectfully. Helping them would not be very costly for C. C refuses only because C believes that B should be prevented from harming himself.

Case (3), Refusal for B's Benefit, introduces a small wrinkle. Here, C does not obstruct the agreement but merely refuses to assist it. As I mentioned earlier, paternalism is often thought to involve positive action or interference on the part of the paternalist. If so, Refusal for B's Benefit would not qualify as paternalistic. On the conception of contract that I have been working with, this would already spell trouble for the claim that the unconscionability doctrine is paternalist, because the doctrine's application results in an omission (a refusal to enforce), not an active obstruction.

But, as I suggested earlier, I think it is mistaken to restrict the scope of paternalist behavior to acts and to exclude all omissions. Some noncoercive refusals to act should be considered paternalist because they involve the same sort of substitution of one's own judgment for another's, as in standard cases like Intervention, from the same motive and thereby enact the same insult. Suppose that Y is properly and legitimately X's agent—X has hired Y to perform morally and legally permissible services for X. If Y fails to carry out X's legitimate instructions because Y believes X has chosen a course of action that does not really conduce to X's good, then, by omission, Y behaves paternalistically toward X. Y has usurped X's authority to determine what would further X's interests and to direct Y's powers toward implementing those plans. Think of Jeeves's initial ma-

neuers around Bertie Wooster²⁷ (although for his benefit) in the books of P. G. Wodehouse or an attorney who refuses to call her well-informed client-defendant to testify because she thinks the client will make a poor impression.²⁸ In these cases, the agent substitutes her judgment with respect to a matter in which her judgment is not supposed to be authoritative. Wooster, as an autonomous adult, is supposed to have authority over the organization and pursuit of his affairs. The defendant is supposed to make the final determination over whether he will be well served by testifying. When the agent's motivation for substituting her judgment is that her judgment is superior to the authoritative agent's, that behavior seems paternalistic, whether it involves active obstruction or (obstinate or inspired) omission.

The preceding point should not be taken too far. The exact nature of Y's motives makes a significant difference. If Y refuses to become X's agent, not from concern for X's welfare, but because, for self-regarding reasons, Y sought to avoid contributing to X's detrimental plans, then Y's refusal would not be paternalist. In such a case, Y's motivation would be to implement her own autonomous judgment about matters properly her own, namely her own welfare, energies, and projects. She legitimately exercises moral judgment about herself and her range of activity. She has a reasonable concern to avoid agent-regret and may act on moral judgments with that end, even if it is not her legitimate concern to act on the same moral judgments with the ends of ensuring that others avoid agent-regret. Thus, if Y-centered reasons motivate a refusal to act as X wants, Y does not treat X paternalistically—even if, when unpacked, these motives contain some important reference to X's welfare and even if more directly X-centered motives would make a similar omission paternalist.²⁹

27. I say 'initial,' because interpreting Jeeves's subsequent actions (and those taken in other long-term relationships and friendships) is somewhat complicated. After some time, it may become clear that the client or friend has authorized, implicitly or explicitly, an agent to act for his benefit, even when this involves circumventing his more specific and immediate instructions.

28. Interestingly, such examples show that paternalists need not be in a position of power over those treated paternalistically. Although, of course, dominance and hierarchical power structures often accompany paternalism and usually exacerbate its badness.

29. Suppose Y already is X's agent, but then refuses to follow one of X's directions because it would involve Y in facilitating X's detriment and Y thinks this would make her, Y, partly morally responsible. Would this refusal be paternalist? On most accounts of paternalism, I think not. Y is not refusing so as to promote X's welfare but so as to protect herself. On my account, the matter is more complicated since this account allows that one may act pater-

This should help us distinguish between Cases (4), Supererogatory Refusal for B's benefit, and (5), Self-regarding Refusal:

4. *Supererogatory Refusal for B's Benefit*: A and B ask C to assist them in their endeavor, claiming that C's participation is essential. C believes that the deal treats B unfairly but, given B's consent, C does not think that her participation will morally implicate C in the unfairness. Rather, moral responsibility for A's exploitative behavior lies with A alone. C refuses to help anyway, out of concern for B, but not because C believes that facilitation would be morally wrong or that he has a duty not to. C simply wants to protect B.
5. *Self-Regarding Refusal*: A and B ask C to assist them in their endeavor, claiming that C's participation is essential. C believes the deal treats B unfairly and that A is taking advantage of B. C refuses to help on the grounds that assistance would implicate C in the exploitation. C refuses to direct her energies to facilitating an exploitative relationship, believing it both to be immoral to facilitate and an unworthy investment of time and energy, especially given her other commitments and ideals.

On the account I have sketched, Supererogatory Refusal (Case 4) involves paternalism. It may be the proper subject of criticism by advocates who place a high premium on autonomy. By contrast, Self-Regarding Refusal (Case 5) does not involve paternalism. Self-Regarding Refusal (Case 5) yields the same outcomes as Refusal for B (Case 3) and Supererogatory Refusal for B (Case 4). But, Self-Regarding Refusal is propelled by C's self-regarding reasons, namely her refusal to lend herself to an unfair or exploitative project on the grounds that it would implicate her and use her energies in ways she disapproves of. By analogy, it seems then that a state's refusal to enforce an unconscionable contract could reflect an unwillingness to lend *its* support and its force to assist an exploitative con-

nalistically even if one's end is not to promote the affected agent's welfare but to promote some end that is legitimately under the affected agent's control. On this account, I think the answer depends a great deal on the details of the case. Sometimes, agreeing to serve as a person's agent involves the legitimate relinquishment, to some extent, of one's power to refuse to do certain things, even for self-regarding reasons and even for moral reasons. In such a case, Y's appeal to self-regarding, i.e., Y-regarding grounds, could represent a usurpation of X's authority with a motive that made the refusal paternalist. In other agency relationships, the agent retains full, or a greater power, to refuse to act in certain ways if her reasons involve moral reservations about what *she* would be doing.

tract because it is an unworthy endeavor to support.³⁰ In such a case, the refusal to enforce unconscionable contracts would not be paternalist.

At this point, one might worry that the analogy between the state and individual, uninvolved parties is inapt. The state, unlike bystanders, bears a special relationship to its citizens. Part of its function is to provide support for parties who make agreements—to provide the institutions necessary to make contracts possible. This makes the state more like the precommitted agent of the contractors than an uninvolved, individual party. Further, it might be objected that an agent's refusal to execute a client's instructions because the agent disagrees with the client's aims *may sometimes*, as I have claimed earlier, be paternalist.

Indeed, part of the state's function may be to supply the sort of support and enforcement practices that constitute the institution of contract. But that observation does not discredit the motivating assumptions of the model of contract or the conclusions I have drawn from it. The institution of contract is a social creation through which we, the community, provide support to one another's agreements to facilitate them and to create greater security in them. Suppose it were true that we were obligated to provide some degree of support to one another, in order to create a community in which citizens, many of whom will be strangers, may interact and form secure, complex long-term relationships on which they and others depend. (Although, notably, this latter claim is a more difficult one for libertarian critics of the unconscionability doctrine to assert). Even so, we still must decide whether this assistance should take form in an absolute, unselective institution of enforcement or if its shape should be more selective and qualified. The sort of agency relationship obtaining between the state and its citizens need not be one of unreflective, ab-

30. See, for example, *Campbell Soup Co. v. Wentz*, 172 F.2d 80, 84 (1949) (explicitly disclaiming that the contract is illegal or that the breaching party had an excuse, while finding it unconscionable because "a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask the court to help in the enforcement of its terms."); *U.S. v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J., dissenting) (summarizing a line of unconscionability cases and putting emphasis on the courts' unwillingness "to be used as instruments of inequity and injustice to enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other"). Cf. *West Coast Hotel v. Parrish*, 300 U.S. 379, 398–99 (1937) (upholding the constitutionality of a minimum wage law in part because "the community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest.")

solute loyalty. It may reasonably have limits. Lawyers, for example, may reasonably refuse to take cases they do not want to assist and may refuse to take action for clients that would involve the lawyers colluding in illegal or unethical action (as when a lawyer must refuse to allow a witness, even the client, to testify if the lawyer knows the witness will perjure himself). In deciding what shape the community's assistance will take in its efforts to provide security for agreements, the community may, reasonably (and perhaps must), evaluate whether it will assist endeavors (and particular citizens) that are significantly exploitative or immoral.³¹

Interestingly, the characterization of the unconscionability doctrine that I am defending is reflected in significant parts of the case law. The unconscionability doctrine, famously, operates as a shield and not as a sword. One may protect oneself against enforcement of an unconscionable contract, but one may not obtain damages for having been subject to an unconscionable offer; nor may one seek restitution for compliance with an unconscionable contract. Although judicial opinions reflect a range of concerns, sometimes including pure concern for the position of the disadvantaged party, a dominant concern of judges is self-regarding: it is to avoid facilitating the actions of an exploiter rather than to act to protect the disadvantaged party. A survey I conducted of many leading unconscionability cases reveals that in nearly every successful claim the court focused on the conduct of the stronger party, not on the weakness or needs of the weaker party.³² Further evidence that the courts' primary

31. For liberals, the question of how and to what degree one may both commit to assistance and make this commitment a selective one is complex. I discuss some of the complexities in Section II.

32. See note 30. See also *Patterson v. ITT Consumer Financial Corp.*, 14 Cal. App. 4th 1659 (1993) (focusing on an arbitration clause's unreasonableness: its indeterminate and remote specified locations, heavy fees, and the failure of the insurance company to call attention to the clause); *Waters v. Min Ltd.*, 587 N.E. 2d 231 (Mass. 1992) (focusing on gross disparity in consideration and on the greater sophistication of defendants); *Niemiec v. Kellmark Corp.*, 581 N.Y.S. 2d 569 (N.Y. 1992) (finding unconscionability despite fact that buyers were neither poor nor illiterate but just because the bargain was so one-sided as to be "a cleverly disguised method of selling nothing but hopes and dreams."); *Derby v. Derby*, 378 S.E. 2d 74, 80–81 (Va. App. 1989) (focusing on one party's taking undue advantage in crafting and presenting a divorce agreement but also indicating concern for the emotional weakness of another party); *D & W Central Station Alarm Co. v. Sou Yep*, 480 N.Y.S. 2d 1015, 1017 (N.Y. Civil Court, 1984) (126 Misc. 2d 37 (S.N.Y. 1984) (focusing on plaintiff's knowing misrepresentation, superior knowledge, and hidden acceleration clause but also mentioning defendant's ignorance of English); *Albert Merrill School v. Godoy*, 357 N.Y.S. 2d 378 (Civil Ct. NY Cty 1974) (focusing mainly on plaintiff's deceptive practices but also noting disproportionate education

concern is to avoid complicity with exploitation and not to protect or bail out the contractor is that the court will refuse to enforce an unconscionable contract even if it is clear that the contractor will not be ruined by the contract's enforcement, because he would be bailed out by the bankruptcy system.³³

D. Objections

Of course, even if the distinction between self-regarding theories of unconscionability and paternalist theories of unconscionability is viable, one may worry that courts use the unconscionability doctrine to pursue paternalist motives, mouthing self-regarding rationales. This is a real worry. (Concerns about courts acting on bad faith should represent a serious concern for views like mine that emphasize the rationale behind a doctrine in evaluating its permissibility or impermissibility, as opposed

and language abilities between plaintiff and defendant); *Spence v. Omnibus Industries*, 119 Cal. Rptr. 171 (Cal. 4th App. 1975) (invalidating an arbitration clause because the fee was excessive and enforcement would permit a contractor "to effectively deny" a homeowner a forum for redress); *Hume v. U.S.*, 132 U.S. 406, 414–5 (1889) (focusing on unreasonableness of price charged, independent of whether government contractor made an error or agreed knowingly to grossly disparate price). See also *Associated Press v. Southern Arkansas Radio Co.*, 809 S.W.2d 695 (Ct. App. Ark. 1991) (denying paternalistic rationale but finding contract unconscionable because its preprinted terms were harsh, there was substantial bargaining power disparity, and it was apparent at formation that the signatory was in financial trouble); *Williams v. Williams*, 508 A.2d 985 (Ct. App. Maryland, 1986) (setting aside oppressive divorce settlement that, independent of husband's state of mind, it shocked the court's conscience, but also noting it was likely that the husband believed the agreement would not be implemented but would lead to reconciliation). But see, e.g., *E & W Bldg. Material Co. v. American Sav. & Loan Ass'n*, 648 F. Supp. 289, 291 (M.D. Ala. 1986) ("Rescission of a contract for unconscionability is an extraordinary remedy usually reserved for the protection of the unsophisticated and uneducated."); *Gonzalez v. Gainan's Chevrolet City*, 690 S.W.2d 885, 887 (Tex. 1985) (Unregulated consumer credit practices "impose intolerable burdens on those segments of our society which can least afford to bear them—the uneducated, the unsophisticated, the poor and the elderly.").

In some *unsuccessful* claims, however, the court's focus was on the ability of the party alleging unconscionability to protect him or herself. See, e.g., *Morris v. Capitol Furniture & Appliance Co.*, 280 A.2d 775 (D.C. Ct. App. 1971) (finding that a sales contract charging \$832, including a \$219 credit charge, for goods costing \$234 wholesale was not unconscionable because buyer could have comparison shopped); *Jones v. Sheetz*, 242 A.2d 208 (D.C. Ct. App. 1968) (declining to find a rental contract unenforceable partly because the tenant was a sophisticated player with a legal education, but partly because the lease's terms were not particularly unreasonable).

33. I am grateful to Christine Littleton for this point.

to views that emphasize outcomes. More outcome-oriented theories may be more tolerant about the possibility of courts acting on poor rationales, so long as a permissible rationale stands available.) There are some ways to formulate and characterize the unconscionability doctrine to resist this possibility. The doctrine might require a rather high or palpable degree of exploitation or manifest unfairness in the deal, to preclude the temptation of a court's merely substituting its judgment for the participants' judgment about the wisdom of the deal. A high threshold would also make more credible the claim that state enforcement would implicate it, to a serious extent, in promoting inequality. A requirement of or emphasis on procedural unconscionability might also serve this function, a different function than it is normally understood to fulfill. That is, the procedural unconscionability prong's significance may extend beyond policing the voluntariness of the agreement, but it may also isolate cases of exploitative or otherwise inequitable relationships that merit special moral concern.

Much of the time, such a self-regarding theory of selective enforcement will produce the same results as a theory of paternalist selective-enforcement, but not always. Those who endorse paternalism would have to defend a broader range of interferences and omissions—including cases like Intervention (Case 1) and Fines (Case 2). Moreover, paternalists might well have reason to prevent B from making a deal that was disadvantageous to B even if B were in a position of advantage such that B was not being objectionably exploited. On the grounds I have offered, by contrast, refusal to enforce would only make sense when the content and outcome of the contract were morally objectionable in such a way as to implicate the judge's and the state's moral stature.

In addition, whether the two approaches yield largely coextensive results, the symbolic and rhetorical significance of the state's refusal to enforce importantly differ. Paternalist grounds communicate disrespect for the autonomy of the protected contracting agent. They may deliver the insult that his judgment (or capacity for effective action) was so poor that interference with or manipulation of the control he enjoys over his life would be warranted. The rationale I have suggested would communicate disapproval of the content of the agreement, translated into an unwillingness to lend the state's powers toward facilitating exploitative endeavors. It may also convey disapproval of the contracting agent whose re-

quest for enforcement was denied. Of course, such ethical criticism also delivers an insult of a sort and perhaps one that has greater sting. But this criticism both seems deserved and is aimed at the actions of the exploiter, not at the capacities or powers of the exploited.

Another objection is that the self-regarding rationale would make an arbitrary distinction between unconscionable contracts depending upon how they are structured. In particular, the approach would distinguish between contracts that involve exorbitant deposits up front from the exploited party and those that require exorbitant forfeitures if the exploited party breaches. Contracts structured around deposits would not require state assistance to make the exploitation effective because, upon breach, the exploiting contractor would just keep the already-procured deposit. By contrast, forfeiture-structured contracts may often require the enforcement power of the state to enact the forfeiture. On the justification I have given, the unconscionability doctrine could be deployed only against the latter, not the former. This may seem to render the unconscionability doctrine both arbitrary and ineffective.

Admittedly, if the point of the unconscionability doctrine were to prevent, rather than to refuse succor to, exploitation, this objection would have great force. But, given that its aims are not consequence-oriented in that way, it should not be surprising that it will obstruct some exploitation, but not other, very similar forms. Still, assuming that the defense I have offered will treat deposit-oriented transactions differently from forfeiture-oriented ones, the natural worry is that the unconscionability doctrine will just provide an incentive to structure all transactions in the former way to evade the application of the doctrine. This would render the unconscionability doctrine wholly ineffectual.

Although my concern here is more to characterize the nature of the unconscionability doctrine than to assess its effectiveness as an egalitarian tool, I am not persuaded that such restructuring, assuming it were to occur, would be entirely successful and would render the unconscionability doctrine pointless. It is less likely that as many people vulnerable to exploitation will be able to generate (and part with), in advance, the exorbitant deposits required by such contracts as may be eligible to sign forfeiture agreements. Further, deposit-structured transactions, by requiring a contractor to part with such an exorbitant deposit up front, wear their exploitative structure on their face. That itself may make some contractors more wary to enter into them.

In any case, it is unclear that the self-regarding rationale necessarily must support a stark asymmetry between the two forms of transactions. It may depend, in part, on how we characterize the system of property. To focus the discussion on contract and to render it manageable, I have proceeded on the implicit, but artificial, assumption that contract and property may be treated separately. But if that assumption were relaxed, the deposits-versus-forfeitures problem would become more complex. There is inadequate space to pursue the matter properly here. Put briefly, though, the status of something as protected property might also be characterized as, largely, a social convention. Advocates of such a view could make arguments similar to the ones I have offered here about what sorts of claims to resources should be afforded the protections associated with property. Those claims to property—e.g., claims over forfeited deposits—that arose from treating others exploitatively might be fully or partially denied the respect associated with other claims.³⁴

A third objection to my defense of the unconscionability doctrine may be that while unconscionable contracts do offer poor and unfair terms, some of these contracts nonetheless do offer better terms than anything else available to the disadvantaged. However poor the terms, the disadvantaged would be worse off without them. So, the unconscionability doctrine, if it deters such offers, makes the disadvantaged even worse off by denying them these opportunities.

I agree that an offer may be exploitative while still offering the best option available to a disadvantaged party. The good in question may be much needed and no one else may offer it, or other offers may be much worse. It is less clear to me, though, that the effect of deterring unconscionable offers, by refusing to enforce legally unconscionable contracts, will necessarily worsen the situation of disadvantaged parties. The effect might, instead, be to encourage offerors to extend more favorable, fairer terms. (I am assuming here that contracts that really fulfill the criteria of unconscionability are ones whose terms favor the offeror to an extent that clearly surpasses the level necessary to make the transaction eco-

34. See, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) in which the Supreme Court, implementing a strategy of constitutional argument analogous to the argument of this paper, refused to enforce a racially discriminatory restrictive covenant because *enforcement* would implicate the state in discrimination and violate the Fourteenth Amendment. It suggested a symmetrical treatment of property and contract enforcement, remarking that the “power of the State to *create* and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment.” *Shelley* at 22.

nomically worthwhile to the offerors.) Of course, how potential contractors will react is an empirical question whose answer may vary depending upon economic and social contexts. As such, I am not qualified to address it.

But, even if the application of the unconscionability doctrine did deter those contractors from being willing to contract with disadvantaged parties on decent terms, it is also unclear to me that the state should react to this unwillingness by relaxing the unconscionability doctrine and facilitating exploitative contracts. It is the offerors' decision to refuse to contract on fairer terms and it is unclear why the state should assume responsibility for and facilitate the offerors' unwillingness to contract for less favorable, but still favorable, terms. Moreover, one should not underestimate the benefits of having an environment in which exploitation does not occur, or at least, in which the state forbears from facilitating clearly unfair treatment. These are just some of the relevant considerations, of course. What policy to pursue may depend, of course, on how important the opportunities are to the disadvantaged and how severe the (unnecessary and imposed) drought of them would be.³⁵

E. Judicial Egalitarianism

As I remarked earlier, this account of the unconscionability doctrine has the resources not only to rebut the charge that it is paternalist but also to supply a preliminary answer to the charge that unconscionability doctrine is an improper tool to pursue egalitarian aims. A common refrain of late is that the application of egalitarian principles in legal rules and in civil suits is inefficient and therefore, ill serves egalitarian aims. The basic claim is that judicial application of egalitarian standards distorts incentives and market transactions. It would be far preferable, it is claimed, to permit the market to operate freely and efficiently, and then to redistribute through the income tax system.³⁶ The surplus that would have been

35. The structure of this problem closely resembles the problem G. A. Cohen has discussed of when a society should give in to the unjustified demands of the talented for higher 'incentives' in order to improve the situation of the worse off. G. A. Cohen, "Where the Action Is: On the Site of Distributive Justice," *Philosophy & Public Affairs* 26, no. 1 (Winter 1997): 3–30; "The Pareto Argument for Inequality," *Social Philosophy & Policy* 12, no. 1 (1995): 160–85; "Incentives, Inequality, and Community," in Grethe B. Peterson, ed., *The Tanner Lectures on Human Values*, vol. 13 (Salt Lake City: University of Utah Press, 1992), pp. 261–330.

36. See, e.g., Fried, *Contract as Promise*, pp. 105–7; Louis Kaplow and Steven Shavell, "Why the Legal System Is Less Efficient Than the Income Tax in Redistributing Income," *Journal*

lost through an inefficient legal rule could instead be captured and distributed to those who are the subject of egalitarian concern.

Whatever the merits of this argument with respect to legal rules generally, there are reasons to suspect this charge has less force when directed toward the unconscionability doctrine. For one thing, the unconscionability doctrine works directly to staunch the flow of resources from the disadvantaged to those who are better off, both by voiding exploitative contracts and by deterring their formation. These are some of the very effects that the redistributive transfers brought about by the tax system would aim in part to reverse.

More importantly, seeing contract enforcement as involving the state as a participant makes possible a different reply to this objection. The state has at least a permission and perhaps a deontological commitment not to assist grossly unfair treatment of one of its citizens by another. Even if the abandonment of the unconscionability doctrine would be more efficient and might enable more generous redistribution, there would still be reason to refuse to insert the state's power between citizens to assist exploitative behavior. By analogy, the state has some reason to refuse to assist in enforcing some practice of private racial discrimination, if asked to do so, even if there were reason to believe that assisting such discrete discrimination would tend to decrease the level of discrimination in society as a whole or might lead to greater state empowerment to combat discrimination. It may be disputable how strong this reason (or this commitment) is. If the consequences on redistribution and welfare levels were severe enough, that might supply reason to relax the unconscionability doctrine and pursue redistributive strategies entirely through

of Legal Studies 23 (1994): 667–682 at 667–68, 674–75, 677 and n.3 (1994); Duncan Kennedy, “Law-and-Economics From the Perspective of Critical Legal Studies,” at 469 (1998) (reporting a consensus that tax and transfer is superior to court-effected redistribution); A. Mitchell Polinsky, *An Introduction to Law and Economics*, 2d ed. (Boston: Little, Brown and Co., 1989), pp. 124–27 (making the general point but not specifically with respect to contracts); Eric Posner, “Contract Law in the Welfare State” at 284 and 284 n. 1 (1995) (citing many sources making the argument about contracts); Steven Shavell, “A Note on Efficiency vs. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?” *American Economics Review* 71 (1981): 414–18. Seemingly, Polinsky shies away from making this argument directly about contractual rules because he believes that redistributive aims are difficult to achieve in contractual relationships through legal rules, pp. 121–24. The difficulties he notes, though, do not hold with respect to contract rules that directly or indirectly regulate prices. See Kaplow and Shavell, “Why the Legal System Is Less Efficient,” at 674 and 674 n.10.

the tax scheme instead. But it does not seem to be a matter entirely of what strategy yields superior distributive outcomes—some deontological element seems to be at play governing the state's active involvement in and assistance to exploitative schemes.³⁷

II. IS PATERNALISM THE ISSUE?

A. Accommodation and Liberal Approaches to Autonomy

So far, I have argued that the unconscionability doctrine does not violate the contracting parties' autonomy rights nor need it be paternalist because contractual enforcement requires the assistance of the community. The community may reasonably balk at lending its efforts to facilitate activity it regards as seriously immoral. Underwriting some institution of contract might be part of what is required to ensure that citizens have adequate means and options for the development and expression of their autonomy. But I think it is implausible that an institution that enforces *all* contracts is necessary to accomplish this aim. In deciding between an institution of universal enforcement, and one of broad, but more selective, enforcement, citizens (and the state) may reasonably object to lending their efforts to assist certain, particularly offensive, endeavors; consequently, they may reasonably prefer the latter institutional arrangement over the former.

This argument most directly addresses the concerns of the libertarian critic of the unconscionability doctrine. But, I do not think this line of argument should be fully persuasive to the non-libertarian, liberal autonomy advocate. The arguments I have invoked to defend the unconscionability doctrine should raise a different, more important set of concerns

37. This not to say that every instance of judicial enforcement of a contract is a form of state action for constitutional purposes, subject to constitutional standards. State action in the constitutional sense should not, I think, be understood as a concept that merely tracks the amount of state involvement or causal activity. The concept of state action seems better understood as a label for an amalgam of factors militating in favor of subjecting state activity to constitutional standards. As I will discuss in the next section, there are different purposes and meanings of state involvement. Not all participation or assistance renders one fully complicit in the ends with which one participates. There may be, for example, good grounds to distinguish the significance and symbolism of state enforcement of an everyday contract between religious parties to build a church and the significance and symbolism of state enforcement of an exploitative contract. The former may not implicate the state in a form of religious entanglement if it is done as an essential part of a reasonable, more general project to facilitate autonomous activity.

for liberal proponents of autonomy. This last section of the paper introduces and explores those concerns.

The analysis of paternalism in the last section aimed, in part, to show that there is more to respect for autonomy than merely fulfilling autonomy rights. A paternalist action may not involve any particular action that violates a distinct autonomy right. Nonetheless, a paternalist motive can make an otherwise permissible action wrong because this motive is inconsistent with respect for autonomy. I will argue that there are other cases in which respect for autonomy should influence our behavior even if the failure to do so will not violate some distinct, independent autonomy right of an agent. The controversy over the unconscionability doctrine may more profitably be seen as a dispute about whether this is one such case. So even if the unconscionability doctrine is not essentially paternalist, its endorsement should not be viewed as a straightforward matter.

To introduce the more interesting problem that the unconscionability doctrine poses for the non-libertarian liberal, I will begin with a broad generalization: non-libertarian liberals strongly support the formation of cooperative endeavors that make members of the society intertwined and interdependent. Some of these cooperative endeavors, they believe, may be funded through the exercise of state powers. Participation may even be mandated by the state (e.g., Social Security, Medicare, perhaps health care generally). We may, for instance, form insurance pools to manage risk more efficiently and fairly and to provide mutual protection against the exigencies of bad luck.

But forming and participating in such collective enterprises can have a constraining effect on freedom. If we become interdependent, then choices that once would have been purely self-regarding take on other-regarding components. Whereas once your tobacco smoking would have been purely self-regarding (conducted in secluded, outdoor areas away from children and nonsmokers), if we are part of a medical group plan, I may be able to claim that your smoking has other-regarding aspects. Your smoking *may* place a burden on the medical care system and increase our premiums, or worse, contribute to scarcity or competition for scarce medical resources.³⁸ Once we are interconnected, I may object to having

38. This claim is contested. See, e.g., J. J. Barendregt, L. Bonneux, and P. J. Van Der Maas, "The Health Care Costs of Smoking," *New England Journal of Medicine* 337 (1997): 1052–57 (reporting that cessation of smoking would yield short-term health-care savings but higher

to subsidize your poor choices. I may claim that your activities have harmful effects on me.

This fact raises a myriad of problems for the proponent of autonomy. While liberals wish to encourage these collective, cooperative enterprises, they may pose a threat to the existence of arenas in which people can freely make and exercise choices without interference or vulnerability to interference. There is something of a trilemma here:

Interconnection renders many (otherwise) self-regarding actions (more) other-regarding and, potentially, detrimental to others. This makes previously protected actions vulnerable to objection or regulation (Prong 1). But the alternatives are either to forego the benefits of connection and community (Prong 2) or to bear the costs of or subsidize community members' freely chosen activity (Prong 3).

Sometimes, one may devise methods to extract the costs individuals impose on the cooperative system. This may represent a compromise or even a straightforward solution. It relieves the impetus to regulate or prohibit the other-regarding behavior and saves others from having to subsidize it. But, cost-extraction at every opportunity and in every context can be wearing. It may also detract significantly from the feelings of community that are generated by such cooperation and part of their impetus. Pricing every action feels picayune, like bean-counting. Often it involves a great deal of observation and accounting that may itself chill or distort autonomous expression.

Comprehensive practices of cost-extraction may also place community members in untenable situations. Some behavior may be taxed as it occurs. For instance, cigarette and liquor sales may be taxed and the collected funds may be used to shift the increased medical costs onto their bearers. But other sorts of costs are difficult to impose at the time the decisions to engage in risky behavior are made. It is more difficult to track and to tax, for instance, sexually risky behavior. And, although it may not violate patients' autonomy rights to refuse treatment to or enact treatment preferences against those who voluntarily incurred risks of disease, at some point this will feel cruel and merciless—the more so the more we have cultivated relations of cooperation and interdependence.

health-care costs in the long-term). For my purposes, I will assume the claim to be true, partly because social and economic losses from early deaths must be considered in addition to health-care costs.

One broad answer to this quandary goes something as follows: within a complex, interdependent community, respect for autonomy must involve more than mere respect for autonomy rights and a strong presumption against paternalist behavior. It must also incorporate some degree of accommodation. To respect others' autonomy and to create the conditions for its meaningful exercise, citizens should bear some costs and refrain from some otherwise permissible interferences, even if this behavior is not strictly required by the set of autonomy rights, and even if citizens significantly disagree with how and toward what ends others exercise their autonomy. That is, citizens should tolerate some level of burdensome other-regarding behavior.³⁹ Even further, they should go beyond mere tolerance and they should subsidize some such behavior.⁴⁰

To be sure, others may not have an autonomy right to have their choices subsidized. Paying the costs of one's own voluntary behavior, generally, is not inconsistent with one's autonomy rights. Indeed, it may generally be an aspect of taking responsibility for oneself, a component of autonomous agency. Nonetheless, subsidizing others' activities, in some domains, may be necessary to retain spheres of activity in which agents can act autonomously and reap the goods associated both with acting freely and with the feeling that one acts freely. Where the environment is permeated by cost-exaction and public-spirited reminders that even many seemingly self-regarding acts have other-regarding effects, agents may feel constrained by the sense that everything they do has an impact on others and is subject to accounting. Even if this accounting is fair, the ubiquity of the message may nonetheless constrain or chill choice. The responsive citizen may not get over the sense that his actions impose costs on others or that they disapprove. Some of the goods of less-encumbered free choice may thus be sacrificed. Some of the more important goods of self-expression may be lost, particularly in arenas in which agents are especially susceptible to social pressure. It may be im-

39. Whether others' impositions should, necessarily, be regarded as *harmful* depends on one's underlying theory of harm. As I argue elsewhere, some theories' designation of all or most costly impositions as harmful seems overbroad and unconvincing. See "Wrongful Life, Procreative Responsibility, and the Significance of Harm," *Legal Theory* 5 (1999): 117–48, and "Harm and Its Moral Significance," manuscript.

40. Toleration is often understood to involve refraining from interference, not providing active support. See, e.g., David Heyd, "Introduction," in David Heyd, ed., *Toleration* (Princeton: Princeton University Press, 1996), p. 11.

portant to preserve some social domains in which one's choices are not so closely monitored so that agents feel psychologically, as well as morally, free to choose as they see fit.

This need not amount to a radical suggestion for change. Our contemporary practices of accommodation are widespread, if not widely acknowledged under this description. One prominent source of accommodation is in the medical arena. For those who have access to medical insurance, higher premiums are rarely charged to those whose behavior is (or has been) relatively unhealthy—those, for example, who smoke, drink heavily, or do not exercise regularly (assuming these have not resulted in 'prior conditions.')

Even if these choices place extra stress on the medical care system or use more resources, we do not ask individuals in these insurance pools to pay more to absorb the costs of their behavior. Admittedly, our practices in this domain are mixed. We levy tobacco and liquor taxes, for example, partly to make the behavior more expensive and partly to collect some of the costs associated with these behaviors. But, interestingly, even if we attempt to collect some costs, we do not do so through premiums—we generally do not threaten to deny access to health care on the basis of past behavior. Most significantly, we tend not to use past, voluntary behavior as a criterion for decision in contexts of scarcity. Those with congenital diseases do not get priority for bypass surgeries over those who have over-indulged. In the United States, at least, currently abstinent alcoholics are eligible for liver transplants, even if their behavior gave rise to their liver failure. This holds true, generally, of the suggested guidelines for organ transplant lists—past behavior, so long as it is not also an indicator of transplant success, is not a criterion for candidacy by the major organ transplant organizations.⁴¹

41. The United Network for Organ Sharing (UNOS), the umbrella organization that coordinates U.S. transplantation and transplantation policy, considers past behavior resulting in organ failure an inadequate basis for excluding candidates. See "UNOS Ethics Committee General Considerations in Assessment for Transplant Candidacy," <http://www.unos.org/>. The American Medical Association and the World Health Organization guidelines also exclude past conduct as a relevant criterion for allocation. See James Neuberger, et al., "Assessing Priorities for Allocation of Donor Liver Grafts: Survey of Public and Clinicians," *British Medical Journal* 317 (1998): 172–75. See also Robert Schwartz, "Lifestyle, Health Status, and Distributive Justice," *Health Matrix* 3 (Spring 1993): 195–217 (arguing against past conduct as a criterion of allocation on a variety of grounds); Carl Cohen and Martin Benjamin, "Alcoholics and Liver Transplantation," *Journal of the American Medical Association* 265 (1991): 1299–1301 (arguing that alcoholics should be eligible for liver transplants). The policy is controversial, though. Some argue that past behavior should disqualify one or in-

Some informational privacy protections may also represent examples of accommodation. A common defense of privacy protections is that the obscured information is strictly irrelevant to the decisions of those who seek it, but that it is the sort of information that people take an overactive interest in and that improperly influence their decisions. This defense is frequently apt but not always. Many of us believe that with respect to employers, and others, we should enjoy privacy rights about whether we consume drugs and alcohol,⁴² our medical status, our relationship status, our contraceptive use, and our credit rating. We also object to certain methods of investigation of information as unduly intrusive, such as polygraph testing.⁴³ In part, this reflects the view that the information or the methods of eliciting it are unwisely overvalued. But it is hard to deny, I think, that the shielded facts can make a difference to job performance. Drug use may cause sluggishness, and relationships and family plans may enhance or detract from job performance. They may signal the likelihood of retention problems or pressing needs to work fewer hours. Ad-

fluence one's placement on priority lists. See, e.g. Alvin Moss and Mark Siegler, "Should alcoholics compete equally for liver transplantation?" *Journal of the American Medical Association*, 265 (March 13, 1991): 1295–99 (arguing that past conduct should influence transplant priority) Neuberger et al., "Assessing Priorities" (reporting some evidence of public sentiment that past conduct is relevant). See generally Robert M. Veatch, "Voluntary Risks to Health," *Journal of the American Medical Association* 243 (1980): 50–55 (discussing the criterion of individual responsibility for illness in allocating health care).

42. The legal status of drug-testing requirements varies depending on the category of people being tested and the jurisdiction. Compare *Chandler v. Miller*, 520 U.S. 305 (1997) (finding unconstitutional under the Fourth Amendment a state law requiring candidates for public office to pass drug urinalysis) and *Borse v. Piece Good Shop, Inc.*, 963 F.2d 611 (3d cir. 1992) (finding that Pennsylvania privacy law would permit a private employee to sue for wrongful discharge for refusing urinalysis) with *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (finding urinalysis tests of government employees who engaged in drug-enforcement, carried arms, or handled very sensitive classified information consistent with the Fourth Amendment), *Skinner v. Railway Labor Executives Ass'n.*, 489 U.S. 602 (1989) (upholding drug testing of railroad employees for safety concerns), *Vernonia School Dist. v. Acton*, 515 U.S. 646 (1995) (upholding drug urinalysis of student athletes), *Twigg v. Hercules Corp.*, 406 S.E. 2d 52 (W.Va. 1990) (limiting a private employer's right to require testing to employees whose work involves others' safety and for whom there is a reasonable suspicion of drug use), *Hennessey v. Coastal Eagle Point Oil Co.*, 609 A.2d 11, 23 (N.J. 1992) (limiting random urinalysis tests to jobs that pose safety issues), *Webster v. Motorola*, 637 N.E.2d 203 (Mass. 1994) (finding that Massachusetts privacy statute permits testing only for safety-related jobs); *Wilkinson v. Times Mirror Corp.*, 215 Cal. App.3d 1034 (1989) (upholding a private company's policy of testing applicants for drug use and medical problems).

43. The Employee Polygraph Protection Act, 29 U.S.C.A. §§ 2001–9 prohibits most employers from requiring employees or applicants to take polygraph tests as a condition of employment.

vocates of privacy rights are advocates, in part, for zones of freedom in which individuals may make decisions that will affect other people and in which they may conceal information about these decisions that would allow others to respond to them in an informed way. We have some sense that it is important to make some kinds of decisions free from the scrutiny and criticism of one's colleagues. Although some colleagues stand to be affected by our decisions, we think more is at stake for the person deciding and that the scrutiny of those who may be affected may exert an intrusive, skewing influence on the decision. So at least some privacy rights operate as protections that permit individuals to make choices and to displace some of their costs onto other people. Others are deprived of the ability to respond to relevant information about these choices as a consequence of the privacy right and therefore, may bear costs that they otherwise could have chosen to avoid.

And, of course, there are the familiar examples of accommodation of others' religious observances and commitments. We have traditionally granted exemptions of conscience to the military draft. Those who do not make claims of conscience, then, have a greater chance of being drafted and bear the costs of those who assume certain religious affiliations. Employment-related accommodations provide another example—efforts are made to exempt certain religious observers from having to work on their observed Sabbath and holidays. Where that is not possible, those who refuse to work on a Sabbath day are eligible for unemployment insurance; their refusals are regarded as the basis for a layoff or termination, not a voluntary quit. As a consequence, others who are not observant may bear extra costs as a consequence of the observants' choice to affiliate with a certain religion and to follow its dictates. The greater costs of the unemployment scheme will be shared by all employers and employees. Workplace efforts to accommodate observant employees may involve asking nonobservant employees to volunteer to take on more rigid schedules or to work a greater number of what are otherwise desirable days to have off (generally weekend days). Employers who accommodate may also hire extra employees to cover the work or shifts of observant employees.

B. Accommodation and Liberal Approaches to Equality

Our practices of social accommodation bear not only on our understanding of liberal approaches to the social support of meaningful auton-

omy, they also bear on our characterization of distributive theories of equality. Many egalitarians take the provision and protection of freedom to be an animating aim of egalitarian theory. Although there are important differences between leading egalitarian theories, most suggest, roughly, that resource distribution should be luck-insensitive and choice-sensitive. Justice requires that resources be distributed according to rules that, on the one hand, neutralize the effects of the operation of morally arbitrary factors (and perhaps also remedy any naturally occurring inequalities) and that, on the other, reflect the choices people make, so that they pay for the costs of their chosen activities. On many prominent conceptions of equality, morally arbitrary features of a person or her circumstances should not affect her access to resources, but her decisions should. People are treated equally and enjoy equal freedom when they internalize the costs of their choices.⁴⁴

The case for accommodation, though, provides some reason to reconsider a stringent commitment to the second element of this pair—thoroughgoing choice sensitivity.⁴⁵ Complete cost-internalization may threaten the meaningfulness of the freedom that it is the aim of these theories to provide fair access to. In some spheres, some relaxation of the norms of choice-sensitivity may be necessary to ensure that autonomy is available in a fully meaningful way.

One may object that it is less a matter of relaxing choice-sensitivity norms and more a matter of properly characterizing them. Pursuing a different point, G. A. Cohen has argued that cashing out choice-sensitivity in terms of market costs may reflect arbitrary factors like contingent, uncoordinated forms of popularity: A's access to welfare may be lower than B's, because the projects B chooses and enjoys are popular. Due to economies of scale, the costs of their pursuit are therefore lower—whereas the projects that would better satisfy A's involuntary (not deliberately cultivated) tastes are undersubscribed and much more expensive, merely because they are a minority taste. In his view, equal access to advantage may

44. See, e.g., Richard Arneson, "Equality and Equality of Opportunity for Welfare," *Philosophical Studies* 55 (1989) 77–93; G. A. Cohen, "On the Currency of Egalitarian Justice," *Ethics* 99 (1989): 906–44; Ronald Dworkin, "What Is Equality? Part 2: Equality of Resources," *Philosophy & Public Affairs* 10, no. 4 (Fall 1981): 283–345; Will Kymlicka, *Contemporary Political Philosophy* (New York: Oxford University Press, 1990), pp. 40–1, 73–77.

45. Elizabeth Anderson has also recently criticized thorough-going choice-sensitivity, albeit on somewhat different grounds. "What Is the Point of Equality?" *Ethics* 109 (1999): 287–337, especially pp. 295–302.

require subsidizing some activities so that people are not disadvantaged by arbitrary patterns of consumption.⁴⁶ These patterns may reflect an arbitrary distribution of involuntary tastes or preferences that are morally arbitrary in much the same way as the natural distribution of resources or talents is; this provides grounds to resist the idea that choice-sensitivity should necessarily be cashed out in terms of market prices.

Granted, some of the examples propelling the accommodation intuition may have this structure. For instance, to consider the religion cases, it is only because there is diversity of religious practice that some observant people's refusal to work on Saturday, in particular, imposes a burden on others. It is only because the Sabbatharians are in the minority that *their* religious requirements pose the burden; were things otherwise and were Sunday observers in the minority, Saturday would be the common day of rest and the situation would be reversed. We might, in this context, understand practices of accommodation as compensating for the moral arbitrariness of demographics, not as a challenge to choice-sensitivity.⁴⁷

Even supposing accommodation of the Sabbatharians can be characterized this way, not all plausible cases of accommodation have this structure. The argument just rehearsed has plausibility when comparing Sabbatharians with most other Christians, but does not work as well when thinking of the claims made by all religious people on non-believers. Or to pursue a different example, a choice-sensitive liver transplantation system that gave higher priority to teetotalers than to drinkers would impose higher costs on drinkers. An advocate of accommodation might prefer the current scheme. But her objection to strict cost-sensitivity would not be that drinking carried higher costs only because it was arbitrarily unpopular or only accidentally connected to organ scarcity. Immoderate drinking really does contribute to the need for organs and for competition for organs between drinkers and those with illnesses for which they are not responsible. The objection would be that some methods of cost-internalization here, however measured, place too much of

46. G. A. Cohen, "On the Currency of Egalitarian Justice," at 932–33.

47. Of course, one might object that some religious burdens should not be characterized as *chosen*. See Cohen, "On the Currency of Egalitarian Justice," at 936. Some inherit their religion and feel unable to shake it off; others may feel compelled toward religious practices in other ways. Religious accommodation may be a particular way in which we follow through on our commitment to luck-insensitivity, broadly understood. To some extent, I imagine this is true, but our commitment to religious accommodation clearly extends even to those who deliberately cultivate religious commitments.

a burden on individuals' choices—both those who drink and those who react and respond to them. Thoroughgoing choice sensitivity would entail sacrificing important aspects of autonomy's value (as well as aspects of the value of proportionality and community). Just to extend one example, the accommodationist method of organ distribution permits health-care workers and the health-care system to respond directly to the calls of compassion and human need. A cost-internalization approach would prevent such responses and force health-care workers to temper their compassion with investigations and moral scrutiny of patients.⁴⁸

This is not to deny that norms of equality pertain—but rather it is to suggest that understanding equality merely in terms of choice-sensitivity and luck-insensitivity may be overly narrow. Norms of reciprocity seem crucial to an attractive conception of accommodation and its place in an egalitarian scheme. Citizens who enjoy the benefits of accommodation in one domain should extend practices of accommodation to other domains of similar behavior or similarly important or personal practices.

C. Unconscionability, Revisited

If the foregoing is roughly correct, the non-libertarian liberal must navigate between two poles to achieve the proper balance of choice-sensitivity and accommodation. On the one hand, some may object that their autonomy is compromised when they have to bear the costs of and lend assistance to projects and endeavors that they have not chosen and morally disapprove of. This is the sort of claim I argued could provide a non-paternalist rationale for the unconscionability doctrine. But it also has the structure of the claims made by those who object to Medicare funding of abortions⁴⁹ and

48. Might it be argued that the argument for accommodation figures within a discussion of how to realize true choice-sensitivity because schemes of accommodation ultimately represent devices to charge people for the real costs of the conditions for meaningful autonomy? I have some concerns about this characterization. Even were it true, it would nonetheless involve a rather strained notion of 'choice-sensitivity' and would cast doubt upon the usefulness of the notion of 'choice-sensitivity' as a guide to designing distributive schemes. Jules Coleman and Arthur Ripstein have, for other reasons, cast doubt upon our ability to deploy the ideal of choice-sensitivity as a principle that could do independent work in implementing systems of distributive and corrective justice. See Jules Coleman and Arthur Ripstein, "Mischief and Misfortune," *McGill Law Journal* 41 (1995): 91–130.

49. This seems to be roughly the argument for finding constitutional the Medicare system's refusal to pay for abortions in *Maher v. Roe*, 432 U.S. 464 (1977). Although there are par-

by conservative students who object to the assessment of mandatory student activity fees, some of which fund political organizations to which they object.⁵⁰ On the other hand, some level of mutual subsidization (what I am calling accommodation) seems necessary to preserve a climate of both meaningful autonomy and community.

So as I see it, the most interesting questions for the autonomy theorist are not so much about how to identify and avoid paternalism, but about how to balance these two, competing, autonomy-infused concerns and to identify the arenas in which mutual accommodation should take place. And the question about the unconscionability doctrine, consequently, is whether unconscionable contracts fall within the category of accommodation. Perhaps this is an arena in which we should subsidize others' choices, by lending our efforts to enforcement, even though we disagree with the choice that is made and would not take it on as our own. Of course, I cannot here attempt to articulate or defend a full theory of accommodation, but by offering some preliminary considerations, perhaps I can suggest a rationale for the continued application of the unconscionability doctrine.

Assuming liberals should practice accommodation as I have described it, it is nonetheless not obvious that there are fixed rules about where such practices of accommodation must occur. There may be a great deal of flexibility about which public arenas are accommodating and which are ones in which it does not violate norms of mutual respect to assess costs or even to restrict choices that have other-regarding effects. It may matter that there be some of each, but which ones are which may reasonably vary across societies and historical periods.

It may be difficult to locate any clear principles that make determinate

allels between the model of contract provided here and the rationale behind Maher, I believe there are additional reasons why public funds should not exclude abortion funding (in addition to the reasons provided by an accommodation rationale). If one views the right to abortion as part of a more comprehensive equal right to the provision of medical care and to the material conditions making the development and exercise of autonomous capacities possible, then there are straightforward reasons to fund abortions.

50. Compare, e.g., *Rounds v. Oregon State Bd. of Ed.*, 166 F.3d 1032 (9th cir. 1999) (upholding the constitutionality of a mandatory student fee that, in part, went toward a controversial environmental group's educational activities) with *Southworth v. Grebe*, 151 F.3d 77 (7th cir. 1998), cert. granted, 526 U.S. 1038 (1999) (holding as violative of the First Amendment a mandatory student fee that, in part, funded political advocacy and lobbying groups). The Supreme Court ultimately rejected the conservative students' argument in *Board of Regents v. Southworth*, 120 S.Ct. 1346 (2000).

where these zones should be. For guidance, it may help to think about why we value autonomy, what sort of freedom and self-determination we aim to protect and support, and to specify more clearly what aspect of autonomy's value may be threatened by dense interconnection without insulation.

I will here, however, focus just on one main advantage of accommodation. Accommodation restricts the sorts of reasons the agent and those who interact with her must consider. To varying degrees, creating insulated areas allows an agent to focus on some of the distinctive reasons associated with the activity. It protects her from worrying about certain goods and reasons only contingently or indirectly associated with the activity. Our medical premium and privacy practices permit a person to evaluate whether to smoke by considering the reasons closely associated with the activity: the social and sensory pleasures (and costs) and the health risks, without having the deliberation salted by other sorts of reasons presented by the threats of job loss, severe income fluctuation, deprivation of health care, and social ostracism. Such other reasons may tend to dominate and overshadow those reasons associated with the activity itself. These practices also permit health-care workers, as I mentioned earlier, to respond directly from motives of compassion and care without having to moderate their reactions with assessments of their patients' desert and moral worthiness.

Or to take the easier case of religious accommodation, it permits a person to assess whether to be observant by considering just whether and how the faith is compelling and whether one is willing to make the personal sacrifices the religion calls for. One is partly insulated from having to consider how outsiders feel, their disapproval, and so on. This sort of focus is valuable partly because it helps to facilitate the agent's integrity—some sorts of decisions are highly delicate and agents are prone to distraction and temptation. But more than that, it promotes a certain sort of freedom. It allows an agent to respond to a certain range of reasons that might otherwise be dominated by considerations relating to others, by morality, or by physical and financial need; in so doing, it permits her the chance to exercise a particular aspect of her capacity for choice. This permits her to exercise a certain range of capacities for choice without having to exercise others. The potential adherent may exercise her capacities for evaluating her religious beliefs and commitments; these are not, in all environments, mixed in with her choices about physical and material

needs. The smoker may, in some (quite limited) sphere, exercise her capacities for making choices about her body and her physical experiences, without also having to engage her capacities for moral deliberation or prudential financial planning. Even a very limited and constricted opportunity to respond to certain sorts of important reasons and to exercise certain capacities for choice in ways that are not fully dominated by other considerations seems like a part of autonomy's value that is worth protecting.⁵¹

If this is at least some of the point of accommodation, then we may adduce some factors that should influence our judgment about whether this is an appropriate sphere for accommodation. These factors might include: whether the decisions being supported are highly personal and critical to one's sense of self (e.g., religion cases); whether the decisions are highly personal ones involving the body; whether the denial of accommodation will engender significant harm or loss of agency (medical care, abortion) for the agent; whether the denial of accommodation will make the agent's projects infeasible; and whether the decisions being supported are ones that are difficult to make and involve hard cases, difficult judgments, or areas in which agents are highly vulnerable or susceptible to overvaluing the opinions or effects on others. On the other side, looking at the costs to be borne by those who accommodate, we should consider what sort of support or involvement by others is required: whether it involves mere financial support or other sorts of involvement, whether the support is direct or indirect, whether the support suggests agreement or affiliation, and so on—whether the degree of support or involvement by the bystanders seriously implicates their integrity or interferes with their capacities to pursue their own autonomous aims, and whether a practice of accommodation in this domain would be especially subject to free-riding.⁵²

51. I make an analogous argument for agent-centered options in "Moral Autonomy and Agent-Centred Options," *Analysis* 51 (1991): 244–54. Related arguments for a conception of the adequate set of options necessary for autonomous choice are made by Joseph Raz in *The Morality of Freedom* (Oxford: Oxford University Press, 1986), Chapter 14.

52. One objection some have to accommodation resembles the objections some have to donating to the homeless on the street: those they encounter may not really be homeless or they may spend donations on short-term, destructive forms of consumption. Similarly, some worry that accommodating practices may *merely* shift costs of the choices of some onto others for no other noble purpose. The risk that one is merely being used gives one reason to choose occasions for donation wisely; analogously, it gives one reason to select are-

Assuming this list is roughly right, these factors give some reason to think that a liberal who endorses some forms of accommodation need not repudiate the unconscionability doctrine. The unconscionability doctrine is two-sided: one is both refusing to assist (accommodate) the exploitative behavior of one party, and, in (welcome) effect, although not necessarily in intention, one is bailing out the disadvantaged, exploited party and saving her from the costs of a harsh contract. It is a hard case but I think there is less of a reason to think this is an arena in which respect for autonomy dictates that one should support the immoral behavior of the exploiter. First, the sorts of things that we have most reason to accommodate are those that are most closely connected to the core of autonomy rights: activities that involve intimate uses of body, the exercise of conscience, or other behaviors that are central to one's sense of self. It is hard to make out, I think, that these aspects of autonomy's value are implicated in the specific market transactions that are the concern of the unconscionability doctrine. This particular sort of contracting is not an especially intimate, close, or personal activity. So it is hard to claim that it is particularly important or valuable for people to have a sense of pure, secured freedom when engaging in these sorts of transactions.⁵³

Second, there is a principled reason for the state to withhold its assistance and to deny that this is an appropriate arena for accommodation. These contracts disrupt and undercut a rough resource equality of condition and fair treatment that we have fundamental commitments to maintaining. To accommodate or assist arrangements that directly tend to undercut this commitment create a tension the state should reason-

nas for accommodation with some attention to where risks of exploitation lie and where the need for insulation from social accounting is especially pronounced. But to refuse to accommodate because of the risk seems akin to refusing wholesale to help the homeless one encounters on the street: it amounts to a disproportionate concern with being had. It is a bad thing to be fleeced—to be sure—but it seems worse to deny aid to the needy systematically out of fear of being fleeced. In a non-ideal world, the risk of being swindled now and again may just be a cost of moral behavior. Similarly, accommodation practices may be susceptible to exploitation but, in appropriate circumstances and with constraints, this seems more like a cost to pay for facilitating autonomy rather than a reason to reject accommodation entirely.

53. I mean to limit my claim to the specific sort of transaction that I discuss here. I do not mean to deny that some economic activities, such as activities associated with labor, may often engage quite closely with core autonomy values. For a sensitive discussion of some of the connections between economic activities and autonomy rights, see Robert McCloskey "Economic Due Process and the Supreme Court: An Exhumation and Reburial" 1962 *Supreme Court Review*: 34–52.

ably avoid. Further, such contracts involve a taking advantage of one citizen by another—a state committed to the equal status of all its citizens should forbear from siding with and lending its force to the citizen who acts contrary to this notion.

In conclusion I have argued that the unconscionability doctrine, a legal tool of egalitarians and other liberals, should not be condemned on the ground that it is paternalist. We may reasonably refuse to lend our efforts and be complicit in the immoral project of another, without displaying an improper attitude. But the fact that we may refuse our assistance without being paternalist does not fully justify our refusal to enforce such contracts. In social, highly interconnected settings, respect for autonomy may involve lending assistance to behavior we disagree with. The contours of accommodation need further explanation. I have suggested that supporting unconscionable contracts may fall outside our accommodation duties. But the general lesson is, I think, that the most interesting contemporary issues concerning autonomy are not ones about paternalism, but about where the lines of social accommodation and its refusal should be drawn.