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Unconscionability, Exploitation, and Hypocrisy

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Suppose you are a black civil rights protestor in the 1950s deciding whether to protest racial segregation of a city's bus system by sitting in seats on a bus that have been designated white only. You will initiate no violence, but you know that your act of defiance will provoke violence by supporters of segregation and the lives of many innocent people will be endangered as a result. Although the segregationist law you are protesting is unjust, and although you ought not to be held primarily responsible for the violence that follows your protest (primary moral responsibility lies with the supporters of segregation who initiate the violence), you are at some level morally accountable for the foreseeable violence that results. If the likely consequences are sufficiently grave and the long-term political gains for the desegregation movement sufficiently slight, then you should call off your protest.

Yet we would find it jarring if the government tried to punish you for your part in causing the violence. For the government's hands are not clean: the government has been enforcing the unjust segregationist laws against which you want to protest. Violence is a foreseeable consequence of these unjust laws (and the underlying racism those laws institutionalize), just as it is a foreseeable consequence of your peaceful protest. So even though the innocent bystanders who would be harmed by the ensuing violence would be entitled to complain if you go ahead with the protest, the government's entitlement to do likewise seems in doubt. The government's enforcement of the segregationist laws seems to

* For many helpful discussions and suggestions, I am very grateful to three anonymous referees, Geoff Brennan, Kevin Davis, Bob Goodin, Jonathan Quong, Hillel Steiner, and Zofia Stemplowska.

deprive it of the moral standing to complain about the consequences of your civil disobedience; it would be acting *hypocritically* were it to do so.

I will argue that there is something similarly hypocritical about the state's refusal to enforce certain contracts on grounds of unconscionability under certain conditions. As Seana Shiffrin has persuasively argued, when the state refuses to enforce an unfair agreement, it need not be acting paternalistically.¹ The state's refusal to enforce the agreement need not be motivated by a desire to protect the weaker party from himself. Rather, it may arise from a desire not to assist the morally deplorable exploitation of the weak by the strong. The state, in other words, might simply be acting on the non-paternalistic judgment that there is something morally wrong with the agreement, and thus something morally wrong with enforcing it.²

But once we give this judgment more precise content, I will argue, it often won't be able to do the work it needs to do to non-paternalistically justify non-enforcement of the agreement without inviting the charge of hypocrisy. On the one hand, if the state takes the view that there is something morally wrong with the agreement because it didn't make sense for the weaker party to enter into it in the first place, then it is difficult to see how the state's justification can avoid embodying a paternalistic judgment about the weaker party's rational capacities. On the other hand, if the unconscionable agreement was entered into freely and

¹ See Seana Valentine Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation,' *Philosophy & Public Affairs* 29 (2000): 205–50.

² Since I focus on the justifications the state can offer for declining to enforce contracts on grounds of unconscionability, I assume that the state can be conceptualized as a unitary actor that has views and motives and makes judgments and, except for a brief discussion at the end of section 4a, I set aside the larger complications raised by this assumption.

rationally by the weaker party, then often there will be nothing morally wrong with it *unless* the conditions under which it was made were unjust. And if the injustice of the initial conditions contributes to the state's view that the agreement is morally problematic, then it is awkward for the state to invoke those moral problems to justify its non-enforcement. Just as the segregationist state promoted the unjust segregation of the races, the state is usually involved in creating or preserving the unjust conditions of contract: its taxing and spending policies help to create the unjust distribution, while the enforcement of its property laws help to preserve it. If this is so, the state acts hypocritically if it refuses to enforce an agreement on the grounds that it has been tarnished with injustice. Its complicity in the conditions it invokes to justify its inaction seem to deprive it of the moral standing to invoke them.³

The thesis this paper will defend, then, is that the state will often find itself caught in a dilemma if it wants to justify the non-enforcement of contracts on the grounds that they are contaminated by injustice. It can avoid offering a paternalistic defense of its inaction by arguing that it doesn't want to dirty its hands with this injustice. But then, so long as the state helps to create and sustain the very conditions that make the contracts unjust in the first place, it cannot do so without making itself vulnerable to the charge of hypocrisy.

This, I will argue, can make it impermissible for the state to decline to enforce agreements on grounds of unconscionability, even if doing so would create a more just distribution of resources. That is, the state's refusal to rectify the baseline injustices with a

³ The analogy to the protestor case is imperfect, for there is an additional reason why condemnation of the protestor may seem inappropriate: the intervening agency of the primary wrongdoers. My point is just that the state's hypocrisy makes its condemnation of the protestor more galling than it would have been had the state played no role itself in sustaining the conditions that produced the violence.

view to achieving the *first-best* distribution of resources may make its pursuit of the *second-best* distribution through the non-enforcement of unconscionable contracts impermissible thus forcing it to choose a *third-best* outcome. This argument has a paradoxical feel when stated in these terms, but I will argue that the apparent paradox disappears once we recognize that there are non-outcome-based constraints on state action that restrain the state from acting hypocritically.

The next section sketches the conception of paternalism I use in this paper. Section 2 outlines the best version of the argument that the state is justified in refusing to enforce certain exploitative agreements on the grounds that it doesn't want to participate in the perpetuation of injustice. Section 3 explains why it is problematic for the state to justify non-enforcement on these grounds. Section 4 evaluates two possible responses. Section 5 evaluates the legal implications. Section 6 concludes.

1. Paternalism

What does it mean for the state to act paternalistically? On what seem to me to be the most persuasive accounts of paternalism in the philosophical literature, action (or inaction) by A towards B is paternalistic when (i) A's aim is to advance B's interests and (ii) A acts (or fails to act) on a belief that B lacks the ability to make sensible decisions for himself. Ability here refers to B's make-up rather than contingent aspects of his circumstances. If A simply believes that B lacks some decision-relevant information, A doesn't act paternalistically towards B by providing B with the information. A would be acting paternalistically towards B, however, if he withheld some information from B because he believed that B wouldn't be able to handle the whole truth. Thus, when asking whether A's act or omission was paternalistic, we ask whether it was motivated by a view of B as in some way incapable of

looking after himself in the circumstances.⁴ As well as seeming extensionally accurate, this judgmental definition has the virtue of focusing our attention on what seems intuitively problematic with state paternalism: such action disrespects its citizens by treating them as if they can't make sensible decisions about their own lives.⁵

Notice that paternalistic state action is presumptively problematic on this account even if the state is correct in its judgment. It is disrespectful to treat an adult like a child even if the adult is in fact childlike in some respect. This is not to say that the state may never act paternalistically all-things-considered. But it has *pro tanto* reasons to avoid policies that treat its citizens as if they cannot rationally govern themselves.

Judgments about citizens' capacities to rationally govern their own lives naturally come in degrees. A judgment that a person is mistaken on a particular occasion might not be much of an indictment of his rational capacities more generally. Indeed, correcting such a mistake might force the person to conform better with his own more considered judgments about what makes his life go well. Thus, such judgments, while still paternalistic, do not offend the normative standard I have articulated to the same extent and so are more likely to be all-things-considered justified. But they nonetheless fall foul of the standard—the state is still making a negative judgment about the person's ability to govern himself on a particular occasion—and so the state still has respect-based reasons not to act on them.

2. Exploitation

What exactly do we mean by an “exploitative” agreement that third-parties, in particular, the state, might not be under a general obligation to enforce? A person might “exploit” the

⁴ For accounts of paternalism that emphasize this requirement, see Shiffrin, ‘Paternalism,’ 218; Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011) 80.

⁵ See Shiffrin, ‘Paternalism,’ 211–20; Quong, *Liberalism without Perfection*, 74–83.

vulnerable state of mind of another—the “promisor”—to manipulate him into entering into an agreement with him. If the manipulation is severe enough, the promisor’s putative consent will have been procured deceptively or coercively, such that he hasn’t genuinely consented to the agreement at all. If so, then the state has unproblematic grounds for its refusal to enforce the agreement: since genuine consent was lacking, there is no agreement to enforce. Thus, a relatively unproblematic version of the unconscionability doctrine simply denies enforcement to putative agreements that likely were made on the basis of such defective consent but aren’t easily covered by the doctrines of duress and fraud.⁶ Assuming that there are ways for courts reliably to identify this defective consent, the state has a straightforward justification for its refusal to enforce the putative agreements that result.

If the state isn’t responsible for the promisor’s vulnerable state of mind when it refuses to enforce the agreement, then it is certainly not acting hypocritically. Even if the state is responsible in some way for the promisor’s circumstances, the state can’t necessarily be charged with hypocrisy as such for refusing to enforce the resulting agreement. Suppose, for example, that the state has created conditions in which, because of their impoverished circumstances, some people are so mentally vulnerable that they are not really capable of freely entering into agreements. Even though the state is responsible for this situation, it doesn’t follow that it ought to act as if those people have freely committed themselves. To do so would be to endorse a falsehood and compound the injustice. It would mean rendering people incapable of acting as fully rational agents, and then, having done that, holding them to standards appropriate for agents who haven’t been so deprived. The state would be acting hypocritically were it to *condemn* someone for entering into an agreement

⁶ For a defense of a version of an unconscionability doctrine along these lines, see Richard Epstein,

‘Unconscionability: A Critical Reappraisal,’ *Journal of Law and Economics* 18 (1975), 301–05.

with such a vulnerable person under these conditions. But there need not be any hypocrisy involved in its simple refusal to enforce the putative agreement, for the state can justify its refusal simply by pointing to the promisor's incapacity and the resulting absence of a genuine agreement.

But cases of impaired consent don't exhaust the domain of the unconscionability doctrine, nor does the concept of exploitation require impaired consent. The state might refuse to enforce an agreement on the grounds that it is exploitative because of its content or other features of the conditions under which it was made rather than because a party's genuine assent was lacking.

When we say that A has exploited B in the absence of deception or coercion, we usually mean that A has in some way taken *unfair advantage* of B's characteristics or circumstances.⁷ Since I'm assuming that each party gives his genuine consent to the agreement, I will set aside the kinds of unfair advantage-taking discussed above that involve coercion and deception.⁸ As Feinberg puts it, when we are outside the realm of duress and fraud, "exploiters are typically opportunists; they extract advantage from situations *that are not of their own making*."⁹

⁷ See Richard Arneson, "Exploitation," in Lawrence C. Becker (ed.), *Encyclopedia of Ethics*, vol. 1 (New York: Garland Publishing, 1992) 350, at 350–51; Joel Feinberg, *Harmless Wrongdoing: The Moral Limits of the Criminal Law* (Oxford: Oxford University Press, 1988) 177; Alan Wertheimer, *Exploitation* (Princeton, NJ: Princeton University Press, 1999) 10; Robert E. Goodin, *Reasons for Welfare* (Princeton, NJ: Princeton University Press, 1988) 130.

⁸ To the extent that these count as instances of exploitation they involve exploitation of a different kind.

⁹ Feinberg, *Harmless Wrongdoing*, 183 (emphasis added). Circumstances *may* be of the exploiter's own making: an exploiter may take advantage of an unjust situation that he created at an earlier point in time.

Someone might object that the focus on *unfair* advantage-taking is overly narrow, because an exploiter may reap a morally reprehensible gain from another's traits or circumstances without the gain coming *at the expense* of the exploited party. For example, when a pornography producer panders to the erotic interests of his audience, some people will say that he is exploiting a human weakness and disapprove of his gains regardless of the price he charges.¹⁰ Even if we agree that such an "exploiter's" gains are morally tarnished in some way, however, it doesn't follow that this supplies the state with any reasons for action, if the state ought to remain neutral among competing conceptions of the good life. When the state acts to prevent such transactions from occurring, the state takes a stand on how persons ought to live their own lives within the bounds that are demarcated by the rights of others.¹¹

Someone might also object that any advantage-taking can't be unfair when the supposedly exploited party has consented to the transaction. The weaker party's genuine consent, it might be thought, absolves all who are involved in the transaction—both his counterparty and those who assist the parties in enforcing the transaction—of moral responsibility for its one-sidedness. But there are several ways in which advantage-taking might be unfair despite both parties' genuine consent.

One possibility is that even though there was no injustice in the conditions of contracting, the terms of the agreement are nonetheless unfair because the contractual

¹⁰ Ibid., 186–87, 198.

¹¹ There is no space to defend liberal neutrality here. Its most influential proponent is John Rawls. *Political Liberalism* (New York: Columbia University Press, 1996). Its most influential opponent is Joseph Raz. *The Morality of Freedom* (Oxford: Clarendon Press, 1986), chapters 5, 6. Such action also looks paternalistic, since it appears to be motivated by a desire to protect the pornography consumers from themselves.

surplus has been very unevenly divided or one person's interests will actually be harmed by the transaction.¹² But while it is easy to see how a one-sided deal could compound an existing injustice, it is not so easy to see how the mere lopsidedness of a bargain that has been voluntarily entered into by both sides from a just starting point can be unjust. Sometimes we make good deals and sometimes we make bad deals. So long as the background conditions against which we transact are basically just, so that no-one is systematically disadvantaged in his dealings with others, the state has little basis for second-guessing what people do with their resources. I thus don't regard the apparent unfairness of a deal alone as providing the state with sufficient grounds to deprive an agreement of its status as a contract.¹³

Second, although I am setting aside cases in which the weaker party is unable to genuinely consent to the transaction, it might still be the case that the rational agency of the weaker party is impaired—though, by assumption, not enough to render him incapable of giving his consent—such that he agrees to terms that are contrary to his best interests. If these are the circumstances that prompt the state to refuse to enforce the agreement, however, it is difficult to see how the state's justification for its refusal can avoid appealing to a paternalistic judgment about the weaker party's rational capacities. The state might say that its refusal to enforce isn't paternalistically motivated, because it arises from a desire not to participate in exploitation of another's irrationality rather than a desire to protect the weaker party against himself. But the state's argument here is premised on its negative judgment

¹² Giving content to "unfairness" in this context is not straightforward. See Wertheimer, *Exploitation*, 216–236.

¹³ Courts echo this sentiment, holding that mere inadequacy of consideration is generally not enough to justify a refusal to enforce an otherwise valid contract. E.g. *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 909 (Kan. 1976); *Jackson v. Seymour*, 71 S.E.2d 181, 185 (Va.1952).

about the ability of the weaker party to take care of himself—its judgment that the stronger party is taking unfair advantage of the weaker party's poor judgment, and, thus, that the weaker party is unable to protect himself. And, since it is the acting on this negative judgment that makes paternalism a distinctive kind of wrong, it seems irrelevant whether the state is ultimately motivated by a self-regarding desire to avoid participating in the wrong rather than a purely other-regarding desire to protect the weaker party from himself.¹⁴

The final scenario is more interesting. The unfairness may arise not from a failure of the weaker party's rational agency, nor simply from the brute asymmetry of the terms of the agreement, but from the weaker party's unjustly impoverished circumstances. Even if such an agreement makes the weaker party better off relative to the pre-transaction baseline, it may nonetheless strike us unfair if the stronger party has *exploited* the weaker party's desperate circumstances to obtain better terms than he would have done had the weaker party not been so impoverished. The unfairness here depends on a counterfactual—a comparison with the bargain that the parties would have struck in the absence of injustice. Hillel Steiner has proposed a liberal theory of exploitation along these lines, according to which there is a tight conceptual link between exploitation and distributive justice: exploitation occurs whenever the terms of an agreement between two parties give one party less than he would have received under the terms that he would have agreed to under just conditions—that is, if both parties began with the share of worldly resources to which they were entitled under the correct theory of distributive justice. The exploiter is the party who

¹⁴ I therefore disagree with Shiffrin's argument that only the latter kind of state action is paternalistic. See Shiffrin, 'Paternalism,' 226–228.

does better than he would have done under just conditions while the exploitee is the person who does worse.¹⁵

Notice that on this account exploitation doesn't require a transaction between a party that is weaker than the other given the current (unjust) distribution of resources. The relevant comparisons are not interpersonal comparisons of the transactors with each other, but *intrapersonal* comparisons of the transactors with their counterfactual selves under just conditions. Exploitation occurs if in the actual unjust world one party gets less out of the transaction than he would have done had the conditions been just. Thus, it is possible for A to be exploited by B even if A begins with more resources than justice entitles him to and B begins with fewer, so that overall the effect of the transaction is to *increase justice*—by taking us closer to the distribution of resources that would have prevailed at the end of the transaction if there had been no initial injustice. For example, such an A is exploited by such a B if in an auction he sells his good to B at a price that C would have beaten had C not been unjustly deprived of his resources just prior to the auction by D. A is exploited by B in this scenario because A does worse and B better than each would have done had the initial conditions been just.¹⁶ Such a transaction is justice improving overall so long as B and A end

¹⁵ The latest statement of Steiner's theory is 'Exploitation Takes Time' in *Economic Theory and Economic Thought: Essays for Ian Steedman*, John Vint, J. Stanley Metcalfe, Heinz D. Kurz, Neri Salvadori & Paul Samuelson, eds. (London: Routledge, 2009). This paper builds on and significantly revises the theory Steiner presented in 'A Liberal Theory of Exploitation', *Ethics* 94 (1984), 225–41 and 'Exploitation: A Liberal Theory Amended, Defended and Extended' in *Modern Theories of Exploitation*, Andrew Reeve ed. (London: SAGE Publications, 1987), 132–148.

¹⁶ Notice that we are talking here of bargaining outcomes that arise if each agent is acting rationally to further his self-interest. When an agent decides to bargain for less than he might out of a sense of altruism for the other or because he makes a mistake (unrelated to any initial injustice), exploitation doesn't result.

up with a share of worldly resources closer to the share they would have had in the absence of injustice.

When exploitation is justice improving as in this example, it is not clear that the transaction is morally problematic. There may be something unfair about the transaction when viewed apart from the injustice of A and B's initial positions, but once we realize that the transaction results in A and B moving closer to the positions they would occupy in a perfectly just world, concerns about unfairness ought to dissipate. So it seems that we need to add something to the account to demarcate the subset of exploitative transactions that are morally troublesome and so might justify state action. I suggest that we should add the requirement that the transaction be *justice reducing*: the transaction must move us *away* from the distribution of entitlements that would have prevailed at the end of the transaction in a perfectly just world. For example, if A is initially unjustly enriched and B unjustly impoverished, and they end up transacting on terms that are less favorable to B than those that would have agreed to in the absence of this initial injustice, the transaction involves justice-reducing exploitation.¹⁷

¹⁷ Courts distinguish between procedural and substantive unconscionability, a distinction first made by Arthur Allen Leff in 'Unconscionability and the Code: The Emperor's New Clause', *University of Pennsylvania Law Review*, 115 (1967), 487. I avoid this terminology because it may obfuscate the distinction I am after. Courts take "substantive unconscionability" to mean "unreasonably favorable terms," while interpreting "procedural unconscionability" broadly "to encompass not only the employment of sharp bargaining practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power, a term that is often used to include bargaining skill." E. Allan Farnsworth, *Contracts* § 4.28 (4th ed., 2004), 301–02. The conception of exploitation I employ here may involve *both*: injustice in the initial conditions (resulting in an inequality of bargaining power) and a bargain that differs in substance from that the parties would have agreed to under just conditions.

This account of exploitation does not attribute significance to asymmetries of bargaining power *per se*. A contract can be exploitative even if there is no asymmetry of bargaining power, and it can fail to be exploitative even if there is an asymmetry. It all depends on whether the terms of trade have been affected by an underlying distributional injustice. This is not as counterintuitive as it might first appear. Some agreements that wouldn't have been made under just conditions seem exploitative even though the exploiters do not receive large windfalls. Consider, for example, markets for payday loans and similar kinds of loan products designed for poor people, where competition seems to be fairly robust. The fact that competition may prevent lenders from profiting very much doesn't eliminate our sense that they are exploitative.¹⁸ Conversely, it is not obvious that an agreement that arises from an inequality of bargaining power when the distribution of resources is just counts as exploitative. If in a just world I am the owner of a famous painting, competition may ensure that I will be able to sell it to the highest bidder for close to the bidder's valuation, enabling me to realize most of the surplus. Nonetheless, it would be strange to say that I had exploited the buyer.

Still these examples are not decisive and someone could plausibly insist that exploitation is simply about disparities in bargaining power. But if that is what exploitation is about, it is not so obviously a concern that gives the state grounds to refuse to enforce certain contracts. Where a bargaining disparity arises out of an injustice, by contrast, the state has good *prima facie* grounds to refuse to enforce a contract. Thus, even if the counterfactual account of

¹⁸ On the counterfactual account, by contrast, they may be exploitative. Under just conditions the same consumers would likely not purchase a loan on those terms because they would have better options. Note that since under just conditions sellers might not be willing to sell such loans at prices that would induce the consumers to buy them, the result may be that no such loan products are sold.

exploitation remains controversial, we have grounds to adopt it when thinking about the justifications the state has for singling out certain agreements for differential treatment.

At least on first glance, Shiffrin's argument seems to work when there is exploitation of this kind. The state can justify its refusal to enforce the exploitative agreement on the simple grounds that it was the product of injustice. However, although the state can thereby avoid the charge of paternalism, it must contend with a different kind of allegation: that of hypocrisy.

3. Hypocrisy

As Shiffrin points out, 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." And in general the state has good reasons to enforce agreements that have been entered into voluntarily. Thus, in deciding whether contract law should include some version of the unconscionability doctrine, we must ask "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."¹⁹ On what grounds, in other words, may the state discriminate among agreements when deciding which of them it will enforce?

I agree with Shiffrin's observations that that the mere fact that two persons have entered into an obligation-generating agreement with one another doesn't entail that third-parties must help each secure the other's performance, and that "there are some agreements that 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."²⁰ However, I don't believe

¹⁹ Shiffrin, 'Paternalism,' 221.

²⁰ Ibid., 222, 224.

that there is an easy path from these observations to a non-paternalistic *and* non-hypocritical justification of the unconscionability doctrine.

If we were living in a Lockean state of nature, in which third-parties regularly acted to enforce others' claims—including those arising from promissory agreements—the argument would be compelling. Suppose that all parties begin with their justly determined share of worldly resources, but the just distribution is upset when A attacks B, stealing all the food that B has stored up for the winter. B, in desperation, makes a one-sided deal with C that is so disadvantageous that he wouldn't contemplate making it under normal conditions.

Suppose that at some point B decides he has already done enough to repay C and reneges on the deal. Must D, who regularly helps others enforce their agreements, assist C in obtaining B's performance? It seems clear that D has no such obligation to assist C in enforcing the punishing terms of his agreement with B. We might even say that D has an obligation *not* to help C benefit from the injustice that B suffered at the hands of A. If D helps C enforce the agreement, he helps to legitimize the pre-agreement positions of B and C, even though they have been contaminated by injustice.

However, it does not follow from these observations that the *state* can so easily extricate itself from the enforcement of such exploitative agreements. The problem is that, unlike D, the state is often directly implicated in creating and sustaining the conditions that cause such deals to be made in the first place. In the state of nature example, suppose that soon after B was robbed, E tried to take back some of B's food from A (to return it to B), only to be thwarted by F, who was guarding A's mound of food. We would think it strange if F refused to assist C enforce his agreement with B on the grounds that the agreement was the product of an injustice, for F became complicit in the perpetuation of the injustice when he prevented E from taking back the food, thus sustaining the unjust, post-theft status quo.

The problem is that state is often in the position of F, for it is in the business of enforcing property rights and determining the distribution of resources through taxation and spending. So for it to refuse to enforce a contract on the grounds that the agreement was exploitative will often stand in tension with its active preservation of the injustice that led the parties to enter into the agreement in the first place. If the state uses coercion to enforce an unjust distribution, surely it should help unjustly impoverished persons further their interests by enforcing their voluntary agreements?²¹

In the state of nature example, F might renounce his earlier action and refuse to assist C in an attempt to make amends for his past treatment of B. But for the state to put itself in the position of the repentant F, it can't simply renounce its *past* actions. It must change, or at least begin the process of changing, the underlying distribution of resources. Otherwise, it, unlike F, will be engaged in the *continuing* enforcement of injustice, making it awkward for it to refuse to enforce certain agreements on the grounds that they are contaminated by that injustice.

Someone might respond that enforcement of the contract won't help the weaker party, for we are supposing that the weaker party wants to default on the agreement. But if parties anticipate that they won't be able to get the state to assist them in enforcing an agreement should one of them default, then they will be less likely to enter into the agreement in the first place. So a refusal to enforce is likely to reduce the set of agreements they are willing to enter into ex ante, which may work to the detriment of the weaker party. Of course, the set of agreements might contract in a way that benefits weaker parties on average. Although

²¹ Someone might respond that the state may have reasons to enforce the current distribution of resources that are not grounded in a desire to preserve injustice. This points to a possible way out of the hypocrisy objection that I consider in more detail in part 4a.

some parties will be deterred from contracting when enforcement is conditioned on the terms of trade not being too one-sided, others may be willing to adjust their terms in order to gain the benefit of state enforcement. Yet, even if weaker parties are, on average, better off if the state refuses to enforce certain agreements on these grounds, the state may not be in a position to make such a move without acting hypocritically.

Suppose that the state identifies a class of particularly one-sided exploitative agreements that it will not enforce. What kinds of agreements will these be? They need not be agreements that result in large windfalls for the exploiters. As explained in section 2, an agreement can be exploitative even in the absence of gross disparities of bargaining power. Sometimes, of course, exploiters will obtain large windfalls. Consider the position of a monopolist, who is providing credit to a poor segment of society, and who has his market power only because of injustice in the distribution of entitlements. (As explained in section 2, there is nothing *per se* exploitative about a monopoly.) Such a monopolist maximizes his profit by artificially contracting his supply of credit so that he can increase the interest rate or otherwise worsen the terms offered to consumers. Under these conditions, a refusal to enforce contracts with terms in the range of the monopolist's profit-maximizing terms will lead to higher supply of credit and lower consumer prices, and so will unambiguously make unjustly poor consumers better off.

Still, even under these conditions it is awkward for the state to refuse to enforce the contract on the grounds that the monopolist is exploiting its customers in a morally inappropriate way, for the state also protects the distribution of entitlements that gives the monopolist his market power in the first place. True, the monopolist is failing to fulfill its duties of justice to the poor. But if we make the non-paternalistic assumption that the consumers act rationally in accepting the monopolist's terms, the monopolist isn't actually

making its consumers worse off. And since the state enforces the pre-agreement status quo, including the monopolist's initial entitlements, the state is also perpetuating injustice. How can the state justify non-intervention in a contractual dispute on the grounds that it doesn't want "to lend its support and its force to assist an exploitative contract because it is unworthy endeavor to support,"²² if the agreement derives its exploitative character from the unjust initial conditions that the state supports?

To reiterate, the assumption here is that the terms of the unconscionable contracts that the state is singling out for non-enforcement arise from the distribution of wealth that the state creates and perpetuates through property law and the taxation system. The state's justification for singling out these contracts for non-enforcement derives from its judgment that they are exploitative. Yet the injustice of the initial distribution of wealth is part of the reason why those contracts are exploitative. (Had the initial distribution been just, the exploiters would not have been able to extract such favorable terms.)

At an interpersonal level, a person is a hypocrite when he blames another for certain actions in a particular way without exposing his own actions to the same kind of critical scrutiny.²³ I am suggesting that something analogous occurs at the state level when the state singles out contracts like these for non-enforcement on the grounds that they are exploitative. For in treating the terms of these contracts as morally tarnished in this way, the state is implicitly condemning exploitation in which it has played an integral part by supporting the unjust distribution of wealth that drives that exploitation. And so it appears

²² Shiffrin, 'Paternalism', 227–28.

²³ For a defense of this claim, see R. Jay Wallace, 'Hypocrisy, Moral Address, and the Equal Standing of Persons,' *Philosophy & Public Affairs* 38 (2010) 21.

to be subjecting the actions of contracting parties to a form of critical scrutiny from which it regards itself as exempt.

4. Responses

There are two ways a defender of the doctrine might respond to the hypocrisy objection. First, he might attempt to *diffuse* the objection by rejecting the key premise that drives the hypocrisy charge—the assumption that the state is in fact subjecting contracting parties to critical scrutiny to which it does not subject its own actions. Second, he might deny that hypocrisy has any bearing on *permissibility* in this context. If this objection succeeds, then the state can continue to decline to enforce exploitative contracts notwithstanding the charge of hypocrisy. I will argue that the diffusion strategy succeeds in only some circumstances, while the second objection fails in general because the state has a *pro tanto* reason not to act hypocritically.

a. Diffusing the objection

Recall that the state does not act hypocritically by refusing to enforce exploitative contracts if it subjects its own actions to the same degree of critical scrutiny to which it subjects the actions of contracting parties. Under certain circumstances, the state can plausibly claim to be doing exactly that.

Since it is unlikely that the state can create a just society overnight, the state could non-hypocritically refuse to enforce exploitative contracts while the society is in its transition phase as part of a more comprehensive program to eliminate distributional injustices. At least so long as the pace of change is no slower than is reasonably necessary, there need not be any hypocrisy in refusing to enforce certain exploitative contracts as part of a such a program. The state would avoid the charge of hypocrisy because, though it would be

continuing to support an unjust distribution of resources during the transition phase, it would have committed itself to eliminating injustice in the most efficient manner possible.

Similarly, the state is less vulnerable to the hypocrisy objection if some force external to the polity (say, the threat of war that makes stability paramount) provides the state with a good reason not to remedy distributional injustices. Even if the state is the historical cause of the existing injustice, the hypocrisy need not be a continuing one, if the state has done everything it reasonably ought to do to remedy existing injustices and is committed to changing it further once the external impediments are gone.

The state can also avoid the charge of hypocrisy if it is not responsible for the injustice that drives exploitation. Consider, for example, the thesis, popular among some American conservatives, that inner-city poverty is caused by a “culture of poverty”—a set of pervasive, counterproductive values and attitudes that are transmitted down the generations, keeping community members in poverty, independently of the unfortunate conditions in which they find themselves.²⁴ If we assume for the sake of argument that this thesis is correct, and the state has done everything in its power to alleviate the initial conditions of deprivation that began the self-perpetuating cycle of poverty, then the state might reasonably argue that it is not responsible for the continuing injustice and so refuse to enforce agreements that exploit community members without making itself vulnerable to the charge of hypocrisy.²⁵ Likewise,

²⁴ William Julius Wilson, ‘Cycles of Deprivation and the Underclass Debate’, *The Social Science Review* 59 (1985), 551.

²⁵ Even assuming that such cultural explanations of poverty contain elements of truth, it is doubtful that the problem of impoverished communities can be entirely accounted for in these terms, and therefore likely that the state bears some responsibility in which case the specter of hypocrisy reemerges. For a survey of social scientific attempts to analyze the connection between culture and poverty, see William Julius Wilson, ‘The

there is no problem if the state refuses to enforce a racially discriminatory covenant to avoid implicating itself in discrimination, at least so long as the state doesn't promote such discrimination.²⁶

It is also conceivable that a state that creates and preserves a basically just distribution of resources might use the unconscionability doctrine as a *justice-preserving* tool. Since it is desirable that the state not intrude too much on the life of its citizens, and since states are large and complex entities charged with administering large territories and populations, it is unlikely that even the best possible liberal state could guarantee that resources are justly distributed among everyone all the time. An unconscionability doctrine could potentially help such a state keep deviations from justice to the minimum by harnessing contracting parties' information about such deviations.²⁷

Additional diffusion possibilities arise if we relax the simplifying assumption that the state is a unitary actor. Even if the state as a whole is responsible for the existing injustices, particular state officials might non-hypocritically prevent state enforcement of exploitative agreements qua individuals. For example, the doctrine might be the best the judicial branch can do in the face of legislatively created injustices, given the constraints of the judicial role and the likelihood of a counterproductive response by other branches of government were

Moynihan Report and Research on the Black Community', *The ANNALS of the American Academy of Political and Social Science* 621 (2009), 34–46.

²⁶ This was the Supreme Court's rationale for non-enforcement in *Shelley v. Kraemer*, 334 U.S. 1 (1948). See also Shiffrin, 'Paternalism', 233 n. 34.

²⁷ Of course, there may be good liberal reasons why this might not be a good way of aiming at a just set of entitlements. Unscrupulous contracting parties may invoke it to try to get out of their contractual obligations, causing the state to second guess many perfectly good voluntary agreements in addition to exploitative ones, which will increase the frictions of contracting.

judges to stop enforcing the laws that ground the unjust distribution of wealth. Still, that would not relieve the state, considered as a whole, of the hypocrisy charge. For the state ends up speaking with two opposing voices—using its coercive resources to enforce the existing distribution of entitlements on the one hand, while refusing to enforce exploitative contracts that arise from that very distribution on the grounds that they are contaminated with injustice on the other.

b. Hypocrisy's Moral Force

Suppose now that the charge of hypocrisy is a valid one. Suppose, that is, that there are steps the state can and should take to rectify the distributional injustices that make exploitation possible. Perhaps the fact that the state would be acting hypocritically were it to refuse to enforce justice-reducing exploitative agreements doesn't give it a reason not to decline to assist the exacerbation of injustice by would-be exploiters.

This objection has *prima facie* plausibility. Suppose that justice ideally requires the state to both refuse to enforce justice-reducing exploitative contracts (*a*) instead of enforcing them (*b*) and to rectify underlying distributive injustices (*x*) instead of continuing to enforce them (*y*). Now suppose that the state is *forced by circumstances outside its control* to choose *y* instead of *x*. Then the best the state can do is choose $\{a, y\}$ instead of $\{b, y\}$; the optimum outcome $\{a, x\}$ is unavailable. But then surely it is irrational for the state to choose *b* instead of *a* in the event that it is *possible* for the state to choose *x* but it chooses *y* instead. But this is the result if the state may not act hypocritically. For it is hypocritical for the state to choose *a* over *b* (by declining to enforce exploitative contracts) when it chooses *y* over *x* (by refusing to rectify the underlying distributive injustices that drive that exploitation).

If the state is only justified in acting if it advances some *telic* conception of distributive justice—that is, to increase the amount of some property that inheres in states of affairs,

such as the equality of the distribution of material resources (perhaps modified to license responsibility-sensitive departures from equality)—then it is hard to see how a state's choice of y entails that it should choose b , since, by assumption, $\{a, y\}$ dominates $\{b, y\}$ in outcome-based terms. But if we think that there is more to justified state action than the promotion of certain states of affairs—if, that is, we adopt a *deontic* conception of justice according to which the state's *treatment* of its citizens can be just or unjust in ways that are not reducible to the fairness of the resulting states of affairs—then this no longer obviously follows.²⁸ On some deontic conceptions of justice, the *attitude* towards its citizens that the state evinces through its reasons and justifications for its actions matters. In particular, it matters that the state be able to justify its actions in terms that are consistent with treating its citizens as free and equal. And therefore the ranking of particular outcomes may depend on the context. More specifically, if the nature of the justification for choosing a over b is affected by whether or not the state could have chosen x instead of y , then the deontic ranking of $\{a, y\}$ and $\{b, y\}$ may change depending on whether the state could have chosen x .

Suppose the state chooses to continue to enforce the unjust distribution of property rights where redistributive measures were possible. How might it justify refusing to enforce justice-reducing exploitative agreements? Since it refuses to rectify the underlying distributional injustices, the state is effectively endorsing the existing arrangements. In effect, the state tells the have-nots that they must make do with what they have. Thus, it seems inappropriate, indeed incoherent, to refuse to help them do the best that they can for

²⁸ Here I draw on Derek Parfit's distinction between telic and deontic conceptions of egalitarianism. Derek Parfit, 'Equality or Priority?' *The Ideal of Equality*, ed. Matthew Clayton and Andrew Williams (Houndmills: Palgrave, 2000), 84. In this discussion, I adopt equality as the assumed principle of distributive justice for illustrative purposes only. A similar distinction could be drawn using the principles of sufficiency, priority, etc.

themselves given those unjust arrangements. The state engages in a kind of double-speak when it singles out exploitative contracts for differential treatment in this way: it refuses to help the victims of exploitation do what they believe will best further their interests given the *state-supported* unjust circumstances in which they find themselves in because it doesn't want to dirty its hands with the injustice of the terms of their agreements; and it condemns the exploiters for the unjust terms of their agreements, even though that injustice arises out of the unjust conditions of contracting that the state supports. Thus, it adopts an attitude of moral superiority towards exploiters—refusing to support their contractual endeavors on the grounds that they are contaminated by injustice, even though the state sustains the very conditions of injustice that made their unjust exploitation possible—while it refuses to help the victims of exploitation engage in forms of exchange that they believe will benefit themselves—thus singling out their choices for differential treatment in the name of an ideal that the state actively prevents being realized. Its justification of its refusal to enforce exploitative contracts thus appears irredeemably incoherent. Moreover, it seems to involve the state adopting an attitude of superiority towards its citizens.²⁹

Perhaps, though, this doesn't affect the justifiability of a refusal to assist exploitation. After all, if the state wrongly tortures political prisoners, it should not refrain from

²⁹ In the interpersonal context, Wallace argues that the wrongness of ordinary forms of hypocritical moral address, whereby one person blames another for something he also does, inheres in its implicit denial of the equal standing of persons: "I treat your dishonesty as a license to disregard your interest in avoiding social disapprobation. But I also act as if I continue to deserve protection from the same effect myself, despite the fact that I have been dishonest toward you in just the same way. As long as it goes uncorrected, this complex stance attaches to my interests greater importance than it ascribes to yours, affording my interests a higher standard of protection and consideration than it affords to yours." 'Hypocrisy, Moral Address, and the Equal Standing of Persons,' 22.

prohibiting its citizens from torturing each other, even though it acts hypocritically when it condemns acts of civilian torture. Why should exploitation be any different?

One possible answer is that permitting torture is simply worse than permitting exploitation so that any injunction against hypocrisy in the torture context is outweighed by the importance of preventing torture. But there is also a qualitative difference between the two scenarios. Acts of state torture and civilian torture involve independent rights violations. The rights violations resemble one another but they are not otherwise linked. The state's refusal to enforce exploitative contracts, by contrast, involves the state condemning a wrong in which it is already implicated.

Perhaps, however, the wrongness of exploitation can be analyzed independently of the state's role in promoting the conditions that support it. Maybe people have duties of justice not to enter into exploitative agreements with others just as they have duties not to torture others. If justice imposes such duties on people, then the state can argue that it is justified in refusing to assist them in breaching those duties—by refusing to enforce contracts in which one party has violated his duty by exploiting the other—even if, hypocritically, it is failing to meet its own obligations of justice by coercively enforcing an unjust distribution of property rights. Does such an argument make sense?

It makes sense to suppose that justice imposes certain duties on people, for example, duties not to interfere with others' justly held entitlements and duties on the haves to relinquish their unjustly-held resources to the have-nots. It is straightforward to identify the persons to whom these duties are owed: duties of non-interference are owed to particular property owners; the duties of the haves to relinquish their resources are owed, collectively, to the have-nots. But to whom exactly do we owe the duty not to exploit?

Notice, first, that any such duty only arises if the background conditions are unjust. If the conditions are just, we may transact with others on any mutually agreeable terms, but if they are unjust, then, assuming such a duty exists, we may not transact with people on terms that they wouldn't have agreed to had the conditions been just, even if those terms are mutually agreeable under existing conditions. Perhaps this duty is owed to those we might exploit? But it is difficult to see how this can work, for we are assuming that the exploited want to transact with their exploiters, and the purported right of the would-be exploitee doesn't give him a right to transact with his exploiter, only a right that *if* they transact, the terms of that transaction be at least as favorable to him as they would have been had they been negotiated under just conditions. It follows that for the right to have its desired effect, it must be an *inalienable* right. If the exploited party can waive his right to transact with his exploiter on non-exploitative terms by consenting to the exploitative transaction, then the exploited party's consent absolves him of any wrongdoing, which is inconsistent with our assumption that the exploiting party has a duty not to transact with others on exploitative terms.³⁰

The notion that the exploited party has an inalienable right not to enter into exploitative agreements is unappealing for it means that freedom has not been maximized: there are transactions—exploitative transactions—that are morally prohibited even if both parties want them to happen. This is not to say that it is not a justified restriction on freedom. It may be justified in terms of a second-best argument that justice will be enhanced if no

³⁰ Alternatively, perhaps there is a right not to be the recipient of an exploitative offer. Since we don't consent to being the recipient of an offer, the issue of the alienability of such a right would not arise. But any such right will be a derivative right—derivative of a more fundamental right not to be exploited. And that returns us to the question whether there could be such a right.

unconscionable contracts are made because poor people will gain on average as a result.³¹ But this is really to say that there is no right against being exploited. Rather, there is some kind of collective obligation on the part of *everyone*, both would-be exploiters and would-be exploitees, to promote justice by not engaging in certain transactions. For if exploitative agreements are morally prohibited, then would-be exploitees are forbidden from entering into lawfully-binding agreements, even though they may individually benefit by doing so. Even if the poor may collectively benefit from such a prohibition, a particular poor person may do better by allowing himself to be exploited (since the alternative may be no transaction at all).

Since, therefore, the state can't say that it is refusing to enforce unconscionable contracts because it is protecting some kind of justice-based *right* against being exploited, it must fall back on the justification that it simply doesn't want to perpetuate injustice. But if it does this, the force of the hypocrisy argument seems inescapable. The problem for the state is that the hypocrisy entailed by refusing to enforce contracts on grounds of injustice under these conditions is not simply the hypocrisy of the pot calling the kettle black. This is certainly part of the problem for, by assumption, the state is in the business of coercively enforcing an unjust status quo when it has no good reason not to change the underlying distribution of property rights. The state's justificatory position is even more precarious than this. For the state is partly responsible for the very exploitation that it condemns in refusing to enforce unconscionable contracts; the hands that it doesn't want to dirty by enforcing such

³¹ Someone might say that therefore freedom can be increased by refusing to enforce exploitative contracts. I think it is more accurate to say that freedom has been reduced but also redistributed from rich to the poor.

agreements are already black.³² Without coercive enforcement of the unjust status quo, there would be no exploitative agreements in the first place.

Indeed, the state's role in creating the conditions of exploitation makes it more culpable than many exploiters. For justice-reducing exploitative transactions don't necessarily yield large profits for exploiters, exploiters might not be aware of the impoverished position of their victims, and exploiters might even be impoverished relative to the just baseline themselves. Even exploiters who drive a hard bargain and profit handsomely as a result are doing something that would be perfectly just if the initial conditions were just.

None of this is say that hypocrisy erects an absolute bar to the state's non-enforcement of exploitative contracts when it declines to eliminate the underlying injustice. Non-enforcement may be appropriate *all-things-considered*. But the state gives itself a reason not to single out exploitative contracts for disfavored treatment when it declines to rectify the underlying injustices from which the exploitation derives. And sometimes that reason will be decisive. Suppose, for example, that the effects of non-enforcement of such agreements will have only a *de minimis* effect on justice. Then the primary effect of the state's refusal to enforce the agreements is symbolic—the state condemns the actions of the would-be exploiters without acknowledging its own role in that exploitation. So the state adopts an attitude of moral superiority towards its citizens, thereby failing to treat them with the respect they deserve as free and equal citizens. And it does so without making any significant change to the distribution of resources. Under these conditions, I suggest, the state has a decisive reason not to single out exploitative contracts for non-enforcement, given that it

³² G.A. Cohen distinguishes these two ways in which a person's moral standing to condemn another can be compromised in 'Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?' in Anthony O'Hear (ed.), *Political Philosophy* (Cambridge: Cambridge University Press, 2006) 113, at 117–33.

declines to make headway in rectifying the underlying injustice from which those exploitative agreements arise. In other words, its refusal to do what it ought to do from the perspective of justice makes it impermissible for it choose the option that is in telic terms second best, thus ensuring that it is required to do something—enforce exploitative contracts—that is, in telic terms, third best.

5. Implications

What then does my argument entail about the state's ability to set limits on the kinds of contracts it is willing to enforce? The contemporary American version of the unconscionability doctrine has its roots in the equitable principle “that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the other.”³³ It is not, however, completely clear what is required for a contract to be “unconscionable” or for a stronger party to have “unconscionably taken advantage” of a weaker party. Courts seem to be driven by several different kinds of concern not all of which are obviously paternalistic or hypocritical.

First, courts are reluctant to enforce agreements when circumstances suggest that one party didn't give his full and informed consent to its terms. Courts are more likely to express such concerns when there was a disparity of bargaining power or sophistication between the parties, since that increases the likelihood that at least some aspects of the putative agreement were not explicitly bargained for and thus possibly imposed on the weaker party

³³ *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 326 (1942) (Frankfurter, J. dissenting); see also E. Allan Farnsworth, *Contract* § 4.27 (4th ed. 2004) 294–98. Courts usually invoke Section 2-302 of the Uniform Commercial Code. See also Restatement (Second) of Contracts § 208 (1981) (containing a similar injunction).

without his knowledge or understanding.³⁴ Contracts of adhesion—so-called because they contain standardized sets of terms that are devised by one party and presented to the other in a more-or-less take-it-or-leave-it fashion—are therefore a cause of particular concern to courts. Although adhesion contracts are generally treated as ordinary contracts and thus a duty to read the contract is imposed on both parties,³⁵ courts will sometimes refuse to enforce objectionable terms if they are presented to the weaker party in such a way that he probably didn't read or understand them.³⁶

There is nothing obviously problematic about these kinds of refusals to enforce contracts. Though courts often emphasize inequalities in bargaining power between the parties and the substantive unfairness of their resulting agreements—which suggests that they might be vulnerable to the hypocrisy objection—as well as the relative lack of sophistication of the imposed-upon party—which is suggestive of paternalism—we can understand these kinds of refusals to enforce contracts as courts' attempts to curb the excesses of an overinclusive rule. If the court's ultimate basis for its refusal to enforce the contract is a judgment that there hasn't been proper assent to its terms, the parties' unequal bargaining positions and the substantive unfairness of the agreement may merely serve to bolster the court's confidence in that conclusion. Thus, although the law generally assumes

³⁴ See, e.g. *Weaver v. American Oil Co.*, 276 N.E.2d 144 (Ind. 1971) ("The evidence showed that Weaver had never read the lease prior to signing and that the clauses in the lease were never explained to him in a manner from which he could grasp their legal significance.").

³⁵ *Heller Financial, Inc. v. Midway Powder Co.*, 883 F.2d 1286, 1292 (7th Cir. 1989); Farnsworth, *Contracts* § 4.26, 287.

³⁶ E.g. *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569, 1574 (D. Kan.1986); *Cutler Corp. v. Latshaw*, 97 A.2d 234, 237–38 (Pa. 1953); *D & W Cent. Station Alarm Co., Inc. v. Yep*, 480 N.Y.S.2d 1015 (N.Y. City 1984); see also Farnsworth, *Contracts* § 4.26, 289.

that parties have read and agreed to all the terms in a contract they have formally assented to, even though such formal assent won't always correspond to actual consent, when it is readily apparent from the circumstances that one party's formal assent didn't constitute genuine consent, courts have grounds to refuse to enforce the contract without acting hypocritically or resorting to paternalism.³⁷

These relatively unproblematic applications of the doctrine involve situations of characterized by what Comment 1 to U.C.C. § 2-302 calls “unfair surprise,” in which “there has actually been no assent to the terms of the contract.”³⁸ But the comment says that the principle of unconscionability is also designed to prevent “oppression,” meaning situations “where, although there has been actual assent, the agreement, surrounding facts, and relative bargaining positions of the parties indicate the possibility of gross over-reaching on the part of either party.”³⁹

When the evidence suggests that there has been actual assent, it is much less clear how courts can avoid the charges of paternalism or hypocrisy. Many cases express a desire not to assist those who appear to have procured favorable terms by taking advantage of the distress

³⁷ See e.g., *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965) (“But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.”); *Waters v. Min Ltd.*, 587 N.E.2d 231 (Mass. 1992) (emphasizing improper behavior on the part of an agent of the defendants in inducing the plaintiff to enter the agreement as well as the grossly unfair terms of the contract in finding the contract unconscionable).

³⁸ *Wille v. Southwestern Bell Tel. Co.*, 549 P.2d 903, 906 (Kan. 1976).

³⁹ *Ibid.*

of another or by benefiting from the foolishness of another. According to an oft-cited statement of the doctrine, an unconscionable contract is “such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”⁴⁰ In the same vein, courts say that it is “fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other.”⁴¹

No doubt there are situations that justify the employment of such a principle without risking paternalism or hypocrisy. Consider, for example, the case of “a salvor who takes advantage of a helplessness of the ship in distress to drive an unconscionable bargain.”⁴² If we think people have a moral duty to rescue others when doing so isn’t too burdensome, then a court may reasonably and non-hypocritically refuse to enforce an extortionate contract that was procured by a salvor’s threat not to act on his duty. For this is an example of an injustice that has been created by the party to the contract, rather than an injustice deriving from the background distribution of entitlements that the courts enforce. But if the “necessities and distress” of the disadvantaged party derive from injustice in the background system of entitlements, it is difficult for a court to non-hypocritically refuse to enforce a contract on these grounds, while it continues to enforce the unjust background system of entitlements that gave rise to it.

As emphasized above, it doesn’t follow that “necessities and distress” can’t be taken into account by a court who wants to avoid paternalism and hypocrisy, for often the plight of the

⁴⁰ *Hume v. United States*, 132 U.S. 406, 411 (1889).

⁴¹ *Kazan v. Dough Boys, Inc.*, 201 P.3d 508, 515 (Ala. 2009), quoting *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 327–28 (1942) (Frankfurter, J., dissenting).

⁴² *United States v. Bethlehem Steel Corp.*, 315 U.S. at 329 (Frankfurter, J., dissenting).

defendant will have made him especially vulnerable to coercive and deceptive practices of the plaintiff. There is a fine line between a paternalistic refusal to enforce a contract and a refusal to enforce a contract out of a belief that the weaker party's genuine assent to the agreement had not really been procured.⁴³ But if the weaker party's assent really was genuine, the court may find it difficult to appeal non-hypocritically to the necessities and distress of the party to justify any refusal to enforce without resorting to paternalism, unless the stronger party has violated some independent moral duty to the weaker party.

6. Conclusion

If the arguments in this paper are correct, the circumstances in which the state can justifiably prohibit or refuse to enforce contracts in the name of justice, and without resorting to paternalism, are limited. The state must either show that it is prepared to begin the process of rectifying the injustices in the underlying distribution of wealth that produce exploitation in the first place, or that the exploitation with which it is concerned derives from an injustice was not something it perpetuates or could have prevented. If it cannot make such a demonstration, it acts hypocritically when it interferes with contracts in the

⁴³ See, e.g. *Niemiec v. Kellmark Corp.*, 581 N.Y.S.2d 569, 569–71 (N.Y. City Ct. 1992) (refusing to enforce a membership agreement procured by high-pressure and possibly deceptive sales tactics that was “nothing more than a cleverly disguised method of selling nothing but hopes and dreams.”); *Derby v. Derby*, 378 S.E.2d 74, 78–81 (Va. App. 1989) (refusing to enforce a divorce settlement against the defendant husband that had been procured by the wife using manipulative and deceptive means while the defendant was in an emotionally weakened state and falsely holding out hope of a reconciliation); *Albert Merrill School v. Godoy*, 357 N.Y.S.2d 378 (N.Y. City 1974) (finding a clause of a contract for a computer clause because of the obviously “disproportionate levels of education between plaintiff and defendant,” defendant’s limited English language skills, but also deceptive practices on the part of the plaintiff).

name of injustice, unless it can show that the weaker party was deceived or manipulated into signing the contract.