

**Phil 116, March 19, 2010**  
**Shiffrin, “Unconscionability, Paternalism, and Accommodation”**

**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. (Think of “payday” loan outfits, credit cards with hidden fees, sweatshops in the developing world, etc.)

*Assumption* (at least for the sake of argument): Some unconscionable contracts really are made freely and with full information. So unconscionability doctrine is not simply an extension of protections against duress or fraud.

*Standard criticism:* Unconscionability doctrine is *paternalist*. It undoes a voluntary agreement between responsible agents.

*Shiffrin’s reply:* Paternalism is objectionable. It is a usually impermissible insult to autonomous agents. But unconscionability doctrine need not be defended on paternalistic grounds.

**What is paternalism? What is wrong with it?**

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.

What makes an action paternalistic is its *motive*:

- Not every paternalistic action *violates an autonomy right*. (E.g., B asks A, an acquaintance, for help. A declines, which A is within her rights to do, but on the paternalistic grounds that B needs to develop his own skills.)
- Not every paternalistic action contravenes *the target’s will*. (E.g., tearing up a credit card offer before B even has a chance to make a decision.)

This focus on *motive* is closely linked to the fact that paternalism is objectionable because it constitutes an *insult*.

- Contrast violating someone’s autonomy rights *inadvertently*: e.g., tearing up my neighbor’s credit card offer because I mistakenly thought it was addressed to me. Because of my innocent motive, the action is not an insult, whatever other objections my neighbor may have.

The paternalistic motive is not always to replace the target’s *judgment* in order to promote the target’s *welfare*.

- Not every paternalistic action aims at the target’s *welfare*. It may aim at something else that the *agent has authority for doing herself*. (E.g., It seems that A may act

paternalistically toward B if A interferes with B's legitimate power to decide matters concerning B's children.)

- Not every paternalistic action distrusts the target's *judgment*. It may instead distrust the target's *agency*. (E.g., if an acquaintance hides the smoker's cigarettes from him, even though they agree on the judgment that the smoker ought to quit.)

*What's wrong with paternalism?* "The motive, I think, is what is central to accounting for why paternalism delivers a special sort of insult to competent, autonomous agents. 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."

### **How can unconscionability doctrine be defended without paternalism?**

First, the legal institution of contract requires the assistance of third parties, outside the agreement: namely, all of us, who contribute to the state's enforcement of contracts.

Second, potential promisors do not have a right to the unqualified assistance of third parties.

- Such a right would threaten the autonomy of third parties, who, without consent, would be required to assist promisors' projects, with which they disagree, etc.

Third, third parties often have non-paternalistic reasons for refusing such assistance.

- The reason need not be that one wants to supplant the judgment or action of the contractors.
- The reason may be simply that one does not want to assist harmful, exploitative, or immoral action.
- Example: Paternalist to hide your cigarettes. But not paternalist to refuse to buy you cigarettes, on the grounds that I believe that it would be wrong for me to aid your addiction.

*Objection:* Unconscionable contracts may offer the disadvantaged better terms than any available alternative. So unconscionability doctrine only makes them worse off.

1. Maybe it will force encourage offerors to extend better terms. (Assumed that the contracts give the offeror more than the bare minimum to make it economically worthwhile to him.)
2. "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."

### **Accommodation:**

Social interconnection means that many (otherwise) self-regarding actions impose costs on others. So we need to choose among:

1. Limiting interconnection and so undermining *community*.
2. Regulating the "self"-regarding actions and so narrowing the scope of individual *autonomy*.

3. *Accommodating*—absorbing or subsidizing—the costs of those “self”-regarding actions, so as to grant others a sphere of autonomous choice.

*Examples of accommodation:*

- Medical care. “For those who have access to medical insurance, higher premiums are rarely charged to those whose behavior is (or has been) relatively unhealthy... Those with congenital diseases do not get priority for bypass surgeries over those who have over-indulged.”
- Conscientious objection.

Relation to unconscionability doctrine: Should we “accommodate” the exploitative arrangement of the contractors—as we accommodate the unhealthy behavior of the higher medical risk, or the pacifist behavior of the religious believer?

- First, we ought to accommodate activities that are central to one’s sense of self. But is that true of the kind of market transactions to which the unconscionability doctrine usually applies?
- Second, we have principled reasons not to accommodate unconscionable contracts. It isn’t simply a matter of bearing extra financial costs, but also of becoming actively involved in upholding agreements that we find morally objectionable. (Why shouldn’t we have a right of “conscientious objection” to refuse such assistance?)