The project of reconciling apparently paternalistic policies with antipaternalism

Viki M. L. Pedersen (vikip@ps.au.dk)

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Abstract How should antipaternalists deal with policies that seem to be at the same time reasonable and paternalistic? In the literature, antipaternalists have sought to show that many policies that prevent people from harming themselves can be justified without appeal to the good accruing to the people interfered with, that is, without appeal to paternalistic reasons. However, while perhaps identifying nonpaternalistic reasons for having the policies under realistic circumstances, antipaternalists often fail, I argue, to identify satisfactory reasons that adequately reflect our real and proper concerns pertaining to such policies. Included in those concerns are arguably the wellbeing of the people whose conduct is restricted by the policy in question. Furthermore, I argue that this unsatisfactory nature of the nonpaternalistic reasons implies that we can construct hypothetical cases in which antipaternalists must abandon the relevant policies sought justified although this would be unreasonable. In these ways, the paper reveals some serious problems of the strategy of reconciling antipaternalism with seemingly paternalistic policies.

Keywords: paternalism; antipaternalism; project of reconciliation; unconscionability doctrine

I. Introduction

The problem of paternalism, according to Feinberg, requires us to reconcile a liberal opposition against policies aimed at protecting people against self-regarding harm with the fact that many
seemingly reasonable polies apparently do just that. Paradigmatic examples include laws requiring the use of seatbelts or motorcycle helmets in traffic. Confronted with such counterexamples, antipaternalists may either (i) argue that the apparently paternalistic policies are in fact not so and hence that they can safely be endorsed; or (ii) reject the policies despite their initial appearance of being reasonable.

The so-called ‘project of reconciliation’ has been the source of a number of ingenious attempts to justify a range of seemingly paternalistic policies by invoking nonpaternalistic reasons in their favor. For example, Seana Shiffrin defends the unconscionability doctrine, which permits courts to reject to enforce unconscionable contracts. Joel Feinberg defends, among others, laws requiring the use of motorcycle helmets in traffic. Gerald Dworkin argues for the so-called ‘safety cases’, which ‘include requiring motorcyclists to wear helmets, hunters to wear brightly colored jackets, sailors to carry life-preservers, and drivers to wear seat-belts.’ He also defends policies ‘forbidding people to sell themselves into slavery or to sell body parts to others.’ Elizabeth Anderson invokes a

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2 This term is attributable to Peter de Marneffe, who finds inspiration from Feinberg’s characterization of the strategy. According to this, antipaternalists aim ‘to reconcile our general repugnance for paternalism with the seeming reasonableness of some apparently paternalistic regulations’ Feinberg, Harm to Self, p. 25 quoted in de Marneffe, ‘Avoiding Paternalism’, p. 68.

3 Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, part I.


5 Ibid.
nonpaternalistic rationale for mandatory contributions to health insurance programs,\textsuperscript{6} and Paul Bou-Habib defends policies making it compulsory for imprudent people to insure themselves.\textsuperscript{7} Common to these arguments is that they seek to identify nonpaternalistic reasons that justify the relevant policies without appeal to the good achieved by the people interfered with.

However, what exactly a satisfactory reconciliatory argument must look like is severely undertheorized in the literature. One contribution of this paper is to try to spell out some of the desiderata pertaining to such arguments. Furthermore, I intend to counter what appears to be a widely shared underlying assumption in the literature, namely that in so far as one may present a nonpaternalistic reason that is sufficient to justify the policy in question without reference to a paternalistic reason, one has shown that the policy is simply not paternalistic. I do this by drawing a distinction between sufficient and satisfactory reasons for policies. While antipaternalists undertaking the project of reconciliation may identify \textit{sufficient} reasons for endorsing the seemingly paternalistic policies under realistic circumstances, they fail to provide \textit{satisfactory} reasons that adequately reflect our real and proper concerns pertaining to such policies. Our inclinations towards the policies in question are not (or, at least not predominantly) grounded in nonpaternalistic considerations of, for example, protecting the interests of third parties. We would arguably not find the policies satisfactory if they did not benefit or protect the interests of the people interfered with as well. Even if the nonpaternalistic reasons may suffice to justify the widely endorsed policies on nonpaternalistic grounds under realistic circumstances, one may still object to the fact that opponents of paternalism make their endorsement or rejection of the policies in question rely upon justifications that do not adequate include our underlying considerations. I illustrate this problem of the project of reconciliation with focus on Seana Shiffrin’s nonpaternalistic defense of the unconscionability


\textsuperscript{7} Bou-Habib, 'Compulsory Insurance Without Paternalism'.
I argue that, even if Shiffrin’s nonpaternalistic reason may allow antipaternalists not to conclude that the state should enforce unconscionable contracts, the case of unconscionable agreements between consenting parties still reveal some serious deficiencies of antipaternalism. More specifically, I argue that antipaternalists must permit slavery under circumstances in which this would be unreasonable.

In light of this problem with option (i) antipaternalists may still resort to (ii), that is the strategy of jettisoning what initially appeared to be a reasonable policy. In many cases this is not, however, I argue, a viable or attractive strategy. Accordingly, a third strategy presents itself as a plausible candidate, namely to endorse the policies on paternalist grounds. This means of course that the antipaternalist approach to such policies proposed by Feinberg goes down the drain. In my opinion, this is not, however, regrettable.

The paper is structured as follows. First, I briefly account for paternalism and present the common procedure of the project of reconciliation. Second, I shortly introduce Shiffrin’s nonpaternalistic argument for the unconscionability doctrine. Third, I argue that this argument is not satisfactory in that it does not adequately reflect our proper reasons for endorsing the doctrine. Fourth, I argue that even if Shiffrin’s nonpaternalistic argument is sufficient to justify the unconscionability doctrine on nonpaternalistic grounds, some unconscionable agreements between consenting parties still represent plausible counterexamples to antipaternalism. The reason is that, in some cases, antipaternalists cannot justify actions interfering with or preventing such agreements to begin with—although it would be reasonable to do so. Fifth, I discuss the option of rejecting the seemingly reasonable policies (i.e. option (ii) above). Finally, I conclude that there are serious problems attached to the procedure of the project of reconciliation, which seems to refute the plausibility of this antipaternalist strategy.
II. Paternalism and the project of reconciliation

The argument of the paper relies on a reason-based understanding of the distinction between paternalism and antipaternalism. According to this, paternalism is plausibly understood as the position according to which the good or benefits to the agent interfered with is accepted as a good and relevant reason in favor of infringements with the agent’s autonomy. To say that reasons of this kind are good and relevant implies that they are valid and should be counted when evaluating the justifiability of policies and actions. This does not imply that paternalists are committed to finding the reasons in question decisive. Paternalists can accept that the so-called paternalistic reasons are sometimes outweighed by other considerations. They accept paternalistic reasons amongst other; accordingly, it is possible to be a paternalist while arguing against interventions benefitting the agents interfered with in different cases. This understanding of paternalism is primarily gleaned from Feinberg’s liberty-limiting principle of legal paternalism.8

In contrast, antipaternalists reject reasons that are paternalistic and thus accept a narrower scope of reasons for infringements with people’s voluntary choices. More specifically, the antipaternalist rejects that prevention of self-regarding harm is a relevant reason in favor of interferences. Antipaternalists believe, Feinberg argues, that such reasons ‘are morally illegitimate or invalid … by their very natures, since they conflict head on with defensible conceptions of personal

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8 Feinberg, Harm to Self, pp. 4, 25-26. Feinberg’s principle focuses, however, on criminal prohibition rather than autonomy. As a number of theorists have argued, this focus on liberty is plausibly too narrow to embed the worries of anti-paternalists, which also include, e.g., freedom from outside pressure and manipulation. See, e.g., Jessica Begon, Paternalism, Analysis Reviews Vol. 76, no. 3, 2016, pp. 355-373 at p. 357; Dworkin 1989, ‘Some Second Thoughts’, p. 123.
autonomy.\(^9\) Policies restricting people’s voluntary choices that can only be justified by appeal to paternalistic reasons are therefore unacceptable to antipaternalists.

This is a rather strong form of antipaternalism. At the same time, the opposite paternalist position appears somewhat weak if one can be a paternalist without ever finding the paternalistic reason decisive. Accordingly, it may be argued that the class of antipaternalists should also include those who believe that the reason for preventing self-regarding harm is relevant and valid, but always outweighed by reasons of respecting individual autonomy. Moreover, paternalists should not only argue that the reason of preventing self-regarding harm is relevant and valid, they should also hold that this reason is sometimes decisive. Based on this latter understanding, people who believe that the possibility of preventing self-regarding harm provides a, sometimes adequate, reason to justify interventions are paternalists. People who believe that this reason is never sufficient to justify such interventions are antipaternalists. Whether the former or latter reason-based distinction between paternalism and antipaternalism is preferable is unimportant to my argument, which is compatible with both perceptions.

As described in the introduction, many authors share the antipaternalist repugnance toward paternalistic infringements of individual autonomy. They are, however, reluctant to reject a wide number of policies that seem to be at the same time reasonable and paternalistic. The apparent reasonableness of such policies seems to support the principle of paternalism, which allows the badness of preventable self-caused harm to count as a, sometimes decisive, reason in favor of interventions. At the same time, the relevant policies strike many as plausible counterexamples to the

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principle of antipaternalism.\textsuperscript{10} For example, as Feinberg puts it, ‘Compulsory helmet legislation … surely has a point, and because of that, it is an embarrassment to the liberal and makes the strongest of the arguments for hard paternalism.’\textsuperscript{11} This challenge to antipaternalism has given rise to the project of reconciliation. The procedure of the project has been to identify or develop sufficient nonpaternalistic arguments, i.e., arguments that fully justify the relevant policy without counting its benefits to the people interfered with in its favor.\textsuperscript{12}

On the face of it, this procedure of the project of reconciliation looks plausible because it seems true that, as expressed de Marneffe, if ‘a general principle of antipaternalism is valid, then we should evaluate these policies by evaluating whether or not there is sufficient nonpaternalistic reason for them.’\textsuperscript{13} The principle of antipaternalism says that paternalistic reasons should not be counted in favor of policies interfering with individual autonomy; accordingly, the strategy of seeking to justify these policies without appeal to paternalistic reasons seems to fit well with this principle. It shows how one may defend the relevant policies without embracing paternalism. If a sufficient nonpaternalistic justification is available, the seemingly reasonable, but apparently paternalistic, policies need not constitute counterexamples to antipaternalism in that those policies can be justified on nonpaternalist ground. As Richard Arneson expounds the thought behind the approach, ‘since a paternalist law is one that is justified, if at all, by paternalistic reasons, finding an alternative rationale


\textsuperscript{11} Feinberg, Harm to Self, p. 135.

\textsuperscript{12} De Marneffe, ‘Avoiding Paternalism’, p. 74.

\textsuperscript{13} De Marneffe, ‘Avoiding Paternalism’, p. 69.
that justifies the law defeats the counterexample’. Accordingly, if successful, the project of developing sufficient nonpaternalistic arguments for seemingly paternalistic policies may be valuable for antipaternalists in that it shows that the seemingly reasonable policies are not ‘intrinsically paternalist’ in that it need not be justified paternalistically.

As I will argue in the following sections, this procedure of the project of reconciliation faces, however, some challenges. I illustrate these challenges in the context of Seana Shiffrin’s non-paternalistic defense of the unconscionability doctrine. First, I argue that the nonpaternalistic argument Shiffrin offers it not a satisfactory justification for the unconscionability doctrine in the sense that it does not adequately reflect our proper reasons for endorsing the doctrine. Second, I substantiate this claim by arguing that even if Shiffrin’s non-paternalistic argument is a sufficient reason for the unconscionability doctrine (in the sense that it suffices to justify the doctrine without appeal to paternalistic reasons), unconscionable agreements between consenting agents still represent hypothetical counterexamples to antipaternalism. Before raising these challenges, I shortly present Shiffrin’s nonpaternalistic defense of the unconscionability doctrine.

III. Shiffrin and the unconscionability doctrine
Shiffrin defends the unconscionability doctrine that ‘enables a court to decline to enforce a contract whose terms are seriously one-sided, overreaching, exploitative, or otherwise manifestly unfair’ by identifying a nonpaternalistic reason in its favor. The unconscionability doctrine has been

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14 Arneson, ‘Joel Feinberg and the Justification of Hard Paternalism’, p. 272. Relatedly, de Marneffe defends a definition of paternalistic policies, which implies that ‘if there is sufficient nonpaternalistic reason for a policy, then it is not paternalistic,’ see, de Marneffe, ‘Avoiding Paternalism’, p. 74.


16 Seana Shiffrin, 'Paternalism, Unconscionability Doctrine, and Accommodation’, p. 205.
characterized as paternalistic in that it repeals a voluntary agreement between two consenting persons because the terms of the contract seem detrimental to one party. In this way, as Shiffrin puts it, the doctrine prevents the voluntary agent ‘from making a binding contract that he actually wills on the grounds that, in some serious way, it does not promote his interests to be bound or to comply.’\footnote{Seana Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p. 211.} This paternalist classification has separated theorists into two groups: those who, in view of the apparently reasonableness of the doctrine, believe that an acceptable role for paternalism can be found, and those who give up the doctrine.\footnote{Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p. 207.}

In contrast to these positions, Shiffrin rejects that the unconscionability doctrine is reserved to paternalists. More specifically, Shiffrin argues that the doctrine can be justified without appeal to paternalistic reasons. Her argument has three steps (where I will focus on the third). First, she clarifies how ‘the legal institution of contract requires, through their role in enforcement, the participation and coorporation of parties outside the agreement – that is, it requires the cooperation of the community, as it is embodied in the state.’\footnote{Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p. 221.} Second, she argues that people are not entitled to the community’s unconditional assistance in entering binding agreements. Third, she argues that the community can refuse to offer such assistance for reasons that are not paternalistic.\footnote{Ibid.}

The nonpaternalistic reason that Shiffrin identifies is, roughly, that the state (or third parties in general) has ‘a self-regarding concern not to facilitate or assist harmful, exploitative, or immoral action’\footnote{Shiffrin, ‘Paternalism, Unconscionability Doctrine, and Accommodation’, p. 224 [emphasis added].}—an interest not to be co-responsible or complicit. Shiffrin illustrates this with reference to a similar 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.’

This justification does not challenge people’s right to make unconscionable agreements; it challenges their right to having such agreements assisted or facilitated by parties outside the contract. If the community has an interest in not assisting or facilitating ‘harmful, exploitative, or immoral action’, then the state’s enforcement of unconscionable contracts would involve a setback to the interests of the community. This implies that the state may be morally justified in refusing to enforce unconscionable contracts with reference to the interests of third parties. This reason for the unconscionability doctrine does not appeal to the benefits achieved by the potential promisors and is thus not paternalistic.

IV. Is the nonpaternalist reason satisfactory?

In this section, I argue that Shiffrin’s nonpaternalistic reason for the unconscionability doctrine is not a proper or satisfactory reason for not enforcing unconscionable contracts. The problem I raise regarding her argument is structurally similar to a familiar criticism of utilitarianism. To avoid unpalatable implications of their theory, utilitarians have sought to show that some tried and true aspect of ordinary morality can in fact be give a utilitarian grounding. For example, they have sought to justify the obligation or weight we attach to repaying loans or fulfilling contracts on the basis of

22 Ibid.
utilitarian reasons. The act of breaking promises may cause feelings of anger and thus counteract the potential increase in utility, or it may generate mistrust of others’ compliance with similar agreements in the future and thereby threaten important social institutions.\textsuperscript{23} Moreover, utilitarians have sought to respond to the objection that they would endorse slavery to the extent that slavery promotes aggregate utility. The utilitarian response is that slavery would never constitute the institution that is superior in terms of utility maximization; in fact, its rejection would promote aggregate utility.\textsuperscript{24}

These utilitarian reasons may suffice to explain why utilitarianism would recommend adhering to promises or would not endorse slavery. Thereby, as G. A. Cohen puts it, utilitarians accommodate those critics who, for example, were ‘worried that slavery might have to be imposed, in obedience to the utilitarian command.’\textsuperscript{25} However, as Cohen argues, the utilitarian response fails to address another concern, namely that utilitarians make their endorsement or resistance to slavery rely upon utility calculations: ‘Saying that the result of such a calculation will always be reassuring is no reply to the objection that whether or not we institute slavery shouldn’t depend upon such calculations.’\textsuperscript{26} Our hostility towards slavery is arguably not based on facts about whether or not slavery generates utility. The utilitarian response to the slavery objection fails to reflect our ‘ultimate convictions’ adequately. Such convictions, as Cohen points out, ‘include a hostility to slavery that is not utilitarianly based, a hostility, be it noted, that is shared by any soidisant utilitarian who thinks it necessary to cite the facts to silence [the] objector’.\textsuperscript{27} Rather, our hostility is grounded in the ‘fact-
free conviction’ that no one should ever find himself in a slavery relation to another person—a conviction that is not reflected in the utilitarian response to the slavery objection.\textsuperscript{28}

I believe that something similar can be said about Shiffrin’s nonpaternalistic defense of the unconscionability doctrine. To be specific, inspired by Cohen’s criticism of utilitarianism presented above, we may glean the following two objections to antipaternalism:

i) I object to antipaternalism because antipaternalists must reject the unconscionability doctrine, although the doctrine is, intuitively, plausible.

ii) I object to antipaternalism because in deciding whether or not the state is allowed not to enforce unconscionable contracts, including slavery contracts, antipaternalists reject the relevance (or decisive relevance) of the interests of potential promisors. Instead, they take the interests of those whose assistance is required to uphold the contracts in question to be crucial.

Just as the utilitarian response may fend off those critics who oppose utilitarianism on the ground that utilitarianism would sometimes recommend slavery, Shiffrin’s argument may seem to accommodate those who oppose to antipaternalism on the ground that antipaternalists would not permit the unconscionability doctrine. In fact, the circumstances may be such that the enforcement of slavery contracts would always give rise to a sense of co-responsibility or complicity, that is, would always involve setbacks to the interests of the community. Accordingly, it may as good as always be possible to justify the unconscionability doctrine with appeal to this nonpaternalistic reason (and without appeal to the harm prevented to potential promisors). In that case, Shiffrin seems to have offered \textit{sufficient} nonpaternalistic reason for the unconscionability doctrine.

However, although this nonpaternalistic reason may be sufficient to justify the doctrine, this would not be a response to the second objection according to which the nonpaternalistic reason

\textsuperscript{28} Ibid.
is not *satisfactory* in the sense that it fails to reflect our more ultimate concern, namely the interests of potential promisors. While paternalists and antipaternalists seem to agree that the state is permitted not to enforce unconscionable contracts, the agreement is based on different reasons, which Shiffrin’s nonpaternalistic defense of the unconscionability doctrine illustrates. Antipaternalists are worried about the interests of the community and argue that, in protection of those interests, the state is allowed not to enforce the contracts. When we refuse to enforce an unconscionable contract, antipaternalists argue, we seek protection *for ourselves* and cater to our own interests in not getting involved. At the same time, antipaternalists rule out the relevance of the harm prevented to potential promisors—or if those benefits are relevant, they are so in an *indirect* sense to the extent they influence the interests of the community.

The question is, however, whether it is plausible to exclude the interests of potential promisors from our consideration of such cases, e.g. slavery cases. Are the interests of the community really *all* that should and do worry us? If anyone is in need of protection, it is arguably the person who, when signing the contract, is potentially in the process of making an enormous mistake. Without the unconscionability doctrine, the promisor would not only have agreed to be living the rest of her life as a slave, she would be binding herself irrevocably to this life. *Regardless* of potential setbacks to third parties, we have very strong reasons for not making it possible for people to enter awful agreements that they do not have the opportunity to get out of again. We should not (or, at least, not only) support the unconscionability doctrine because we are worried about the interests of the community. The reason that we want to bar potential promisors from the consequences of their major mistakes seems much more intuitively compelling and appropriate than the alternative, possibly sufficient, reason that we want to protect our own interests. Moreover, we would arguably not find the doctrine satisfactory if it did not benefit or protect the interests of the slave as well. Excluding this paternalistic reason from the justification of the unconscionability doctrine and appealing only to the
interests of the community does not seem adequate. If I am right that Shiffrin’s nonpaternalistic reason is unsatisfactory in this way (in section IV, I seek to underpin this further), whether or not we enforce slavery contracts should arguably not rely on this reason.

One may ask why this objection ii) is important in light of the fact that antipaternalists seem to avoid objection i)? In other words, if the nonpaternalistic reason is sufficient to justify the unconscionability doctrine, why is it then important whether or not the justification provided actually reflects our real and proper concerns? The nonpaternalistic reason and the paternalistic reason seem to lead to the same practice. However, as in most other aspects of political philosophy, we should not only care about practice. As Cohen points out, ‘the question for political philosophy is not what we should do but what we should think, even when what we should think makes no practical difference.’ If Cohen is right, then it becomes important that we appeal to reasons that reflect ‘what we should think’, even when alternatives may in fact justify the relevant practice. Accordingly, if the harm to potential promisors is a proper consideration that not only do but also should worry us in cases of unconscionable agreements, then it is a shortcoming of antipaternalism that the position excludes this consideration from their justification of the unconscionability doctrine.

Shiffrin’s nonpaternalistic reason appealing to the interests of the community may, however, reflect some of our real and proper worries regarding the unconscionability doctrine. The apparently unfair and exploitative nature of the contract may indeed conflict with others’ interests not to get involved in such agreements and make a case for others not to assist the contract. Accordingly, the alternative paternalistic reason may not deplete or exhaust our concerns grounding the doctrine. For the same reason, it may be objected that if the nonpaternalistic reason is not satisfactory then the paternalistic reason is unsatisfactory as well. So, in light of the above objection to antipaternalism, why is this not an equivalent objection to paternalism?

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The reason is that while antipaternalists reject paternalistic reasons (or reject these as ever being decisive) nothing in paternalism precludes the acceptance of nonpaternalistic reasons. Therefore, if we should not only worry about the interests of Rita, but also the interests of the community in the above case then this is not a problem for paternalists. Paternalists can accept that such considerations are also relevant. In fact, even if the unconscionability doctrine to some extent counteracts the paternalist aim of benefitting the person interfered with paternalists are not committed to abstaining from interference in such situations. As Feinberg argues, it is completely consistent with paternalism to accept that, sometimes, nonpaternalistic reasons should make us override or set aside paternalistic considerations. For these reasons, paternalists find themselves better equipped to provide satisfactory reasons for policies protecting people against self-regarding harm even if the paternalistic reason in itself only reflects a substantial part of our proper concerns pertaining to such policies.

IV. A hypothetical counterexample

As I mentioned above, Shiffrin’s nonpaternalist reason appealing to the interests of the community may save antipaternalists from the conclusion that slavery contracts must be enforced by the state (cf. objection i)). In that case, the nonpaternalistic reason seems sufficient to justify the unconscionability doctrine without appeal to paternalism. Accordingly, the nonpaternalistic reason seems to defeat the counterexample in that it shows that the apparently reasonable unconscionability doctrine need not be paternalistic. Below, I argue, however, that antipaternalists must permit slavery under circumstances in which this would be unreasonable. If I am right, the slavery case still represents a counterexample to antipaternalism. This argument substantiates the point that our opposition towards

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30 Feinberg, Harm to Self, p. 25.
unconscionable agreements are not (or, at least not predominantly) grounded in nonpaternalistic considerations of, for example, protecting the interests of third parties.

To illustrate this objection, consider the following case. Rita has made an agreement with another person according to which she consents to be living the rest of her life as a slave. At the time of signing the contract, she knew exactly what she was doing, and her choice can be characterized as voluntary. However, as often happens when people make hazardous choices and the outcome is bad, today, one year later, Rita regrets her decision. She now lives a wretched and unhappy life as a slave. Since she is a conscientious character who is committed to keeping promises, it is, however, unthinkable that Rita herself will do anything to break out of the agreement. If nobody intervenes, Rita will proceed her life as a slave. In this case, there is no need for the state to facilitate or assist the unconscionable agreement between two consenting agents. Accordingly, the issue is no longer whether this agreement should be enforced but whether the state should intervene and prevent the agreement to begin with.

Can antipaternalists come up with a reason that justifies such interference? At any rate, Shiffrin’s nonpaternalistic reason for the unconscionability is not available in this case. According to Shiffrin, the unconscionability doctrine is justifiable because it protects others from having to assist or facilitate unconscionable agreements. There are, as she puts it, ‘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’. In this way, her defense of the unconscionability doctrine assumes that people have a right to form unconscionable agreements. It is this right to form unconscionable agreements that is challenged if we believe that the state is justified in intervening with the slavery agreement.

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31 Shiffrin, p.
In explaining what is wrong with unconscionable contracts, antipaternalists may, however, appeal to alternative nonpaternalistic reasons. In this context, Feinberg offers three proposals. The first is a soft paternalistic justification according to which it is plausible to assume that no one would voluntarily sell him or herself into slavery. Nevertheless, as Feinberg himself argues, ‘[i]t may literally be true that “no one in his right mind would sell himself into slavery,” but if this is a truth it is not an a priori one but rather one that must be tested anew in each case by the application of independent, non-circular criteria of mental illness.’

Moreover, this soft paternalistic reason is not available in the above case in which we have assumed that Rita is acting voluntarily.

The second nonpaternalistic reason that Feinberg suggests is a legal moralistic one. This argument focuses on the exploitation involved even in voluntary slavery contracts. Most agree that it is deeply immoral to take another person as a slave, which from a legal moralistic point of view may explain why people do not have a right to do so. The argument is not paternalistic in that it focuses on preventing people from acting immorally by becoming slave-owners rather than preventing people from harming themselves by becoming slaves. The moralistic spirit of the argument is, however, as Feinberg acknowledges, not congenial to the liberal way in which antipaternalists prefer to argue.

Feinberg’s third proposal is on the protection of third party interests and thus related to Shiffrin’s nonpaternalistic reason for the unconscionability doctrine. In contrast to Shiffrin, Feinberg does not appeal to the costs of facilitating of assisting unconscionable agreements, but rather the costs of witnessing or remedying the effects of such agreements. According to Feinberg, ‘[t]here are certain risks … of an apparently self-regarding kind that men cannot be permitted to run, if only for the sake of others who must either pay the bill or turn their backs on intolerable misery.’ Feinberg is not

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32 Feinberg, p. 117. See also G. Dworkin, ‘Some Second Thoughts’.

33 Feinberg, p. 118.

explicit about the more specific content of ‘the bill’ in this slavery case. He may be right, however, that slavery agreements can have certain negative effects on the interests of third parties and that these warrant interference by the state.

As I have argued, I find Shiffrin’s antipaternalistic defense of the unconscionability doctrine unsatisfactory in that it fails to reflect the real and proper concerns grounding our positive inclinations towards the doctrine. In the same way, I believe this nonpaternalistic argument by Feinberg fails to reflect the basis of our resistance towards slavery agreements—a resistance that is arguably not grounded in a concern for third party interests. However, to test whether this believe is plausible, I must exclude the possibility of appealing to this nonpaternalistic consideration from the case of Rita. Whether Feinberg’s nonpaternalistic reason for preventing or interfering with unconscionable agreements between consenting agents warrants such actions seems, at least, to be a very contingent matter.\(^{35}\) Accordingly, it seems that we can reformulate the slavery case in a way that makes it impossible to appeal to costs to third parties.\(^{36}\) For example, let us suppose that Rita has no relatives or friends who would be deeply affected by her decision.\(^{37}\) Moreover, we may assume that the state requires that the parties of the contracts purchase insurance that will cover potential costs which may result from Rita’s misery (e.g. to finance psychological treatment). If I have excluded the relevant third party considerations and the case for preventing or interfering with Rita’s decision of becoming a slave is persuasive in this thought experiment, it seems that antipaternalists face a hypothetical counterexample; they would have to permit slavery in a situation where this would be unreasonable.

\(^{35}\) See [reference excluded].

\(^{36}\) Here I am inspired by Arneson’s procedure in ‘Joel Feinberg and the Justification of Hard Paternalism’, p. 273.

\(^{37}\) Not that I am convinced that this would in itself justify the state in preventing Rita from harming herself.
One question that remains to be answered is whether we should now endure this case of a person voluntarily consenting to slavery. Here, it is of course possible (and consistent with antipaternalism) to take the position that, in absence of nonpaternalistic reasons to appeal to, it is reasonable to let people sell themselves into slavery as it is always more important to respect people’s voluntary choices than to prevent them from potentially destroying their future interests. Antipaternalists may bite the bullet and accept slavery in absence of nonpaternalistic reasons to appeal to. However, in my view, this admirably persistent approach seems to conflict with common sense in two ways. First, to prevent Rita from living the rest of her life as a slave would be to prevent an outcome that is uncontroversially bad. Insisting that it is, in principle, wrong to interfere with voluntary agreements to prevent outcomes even of this kind seems to involve an intuitively implausible rejection of important considerations. Second, it is not in any way clear to me why the absence of relevant costs to third parties should have such a crucial importance in determining how to deal with Rita’s situation. It seems at best inadequate to let the decision to prevent Rita’s misery rely upon the need to protect the interests of others. This second point is derived, of course, from the concern I have raised that our resistance towards slavery should not, or at least not exclusively, be grounded in third party considerations.

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38 See also Dworkin, ‘Some Second Thoughts’, p. 126.