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Paternalism and the Law of Contracts

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Our legal system, like every other, limits the power of individuals to enlist the state in the enforcement of their private agreements.¹ In a broad sense, all limitations of this sort restrict the contractual freedom of those involved by depriving them of the right to decide whether their voluntary arrangements shall be legally binding. Many of these limitations are intended to protect the interests of third parties, including the general interests of society at large: Two neighbors cannot make an enforceable contract to rob a third, nor can a group of businessmen negotiate a price-fixing agreement that will be binding as a matter of law. Other restraints on contractual freedom, however, are primarily intended to protect those whose freedom they restrict. Restraints of this sort aim to protect people from themselves by limiting their capacity to make enforceable agreements of various kinds.

In general, any legal rule that prohibits an action on the ground that it would be contrary to the actor's own welfare is paternalistic. The prohibition against suicide,² the requirement that motorcyclists wear helmets,³ laws that restrict the use of drugs⁴ or make education compulsory⁵ are all

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1. See 2 M. WEBER, *ECONOMY AND SOCIETY* 668-71 (1968) ("[I]n no legal order is freedom of contract unlimited in the sense that the law would place its guaranty of coercion at the disposal of all and every agreement regardless of its terms.").

2. See W. LAFAVE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 568-71 (1972).

3. See Note, *The Limits of State Intervention: Personal Identity and Ultra-Risky Actions*, 85 *YALE L.J.* 826, 830-34 (1976).

4. See, e.g., Abromovsky & McCarthy, *Civil Commitment of Non-Criminal Narcotic Addicts: Parens Patriae; A Valid Exercise of a State's Police Power; or an Unconscionable Disregard of Individual Liberty?*, 38 *PITT. L. REV.* 477 (1977); Kaplan, *The Role of the Law in Drug Control*, 1971 *DUKE L.J.* 1065.

5. E.g., *CAL. EDUC. CODE* §§ 48,200-48,320 (West 1978); *CONN. GEN. STAT.* § 10-184 (1983).

examples of legal paternalism. In this Article, I shall be concerned with one branch of this wide and heterogeneous family of legal rules—those that may properly be regarded as belonging to the law of contracts because the liberty they restrict is the liberty to bind oneself by making a legally enforceable promise.

One (relatively new) example of the kind of restriction I have in mind is the rule invalidating any provision in a residential lease that purports to waive the tenant's right to withhold rent if the property fails to meet certain minimum standards of habitability.⁶ Even if a tenant believes that a waiver of this sort would be in his own interest and voluntarily agrees to include it in the lease, the law protects him by refusing to enforce his waiver. The invalidity of contracts of peonage or self-enslavement,⁷ of agreements purporting to waive the promisor's right to obtain a divorce⁸ or sue for relief under the bankruptcy laws,⁹ of provisions conferring on either party a right to specifically enforce their agreement (where no right of this sort exists as a matter of law);¹⁰ the voidability of most contracts made by infants;¹¹ and the nonwaivable "cooling-off" period imposed by law in many consumer transactions¹² all also have, at least in part, a paternalistic objective. Unquestionably, some of these limitations on the enforceability of private agreements also seek to protect the moral and economic interests of third parties and, to this extent, have a nonpaternalistic objective as well. One central purpose of each, however, is to protect the promisor himself by limiting his power to do what the law judges to be against his own interests; this is paternalism, and there is more of it in our law of contracts than one might suspect.

All paternalistic restrictions on conduct, including those contained in the law of contracts, raise special problems from a moral point of view. It is possible, of course, to deny that any such restrictions exist (by maintaining that every apparent example of paternalism is in reality a disguised prohibition against conduct that violates the rights of other persons).¹³ But

6. See *infra* p. 766.

7. See 18 U.S.C. §§ 1581-1588 (1982); see also *Pollock v. Williams*, 322 U.S. 4, 7-13 (1944) (detailing history of Peonage Statutes); *Peonage Cases*, 136 F. 707, 708 (E.D. Ark. 1905) (peonage "is the holding of any person to service of labor for the purpose of paying or liquidating an indebtedness due from the laborer or employee to the employer, when such employee desires to leave or quit the employment before the debt is paid off").

8. See 15 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS §§ 1741-1743 (3d ed. 1972).

9. See *Fallick v. Kehr*, 369 F.2d 899, 905 (2d Cir. 1966) (Friendly, J., dissenting); *Federal Nat'l Bank v. Koppel*, 253 Mass. 157, 148 N.E. 379 (1925).

10. See *Kronman, Specific Performance*, 45 U. CHI. L. REV. 351, 369-76 (1978).

11. See 2 S. WILLISTON, *supra* note 8, §§ 222-248.

12. UNIF. CONSUMER CREDIT CODE §§ 3-501 to 3-505 (1974); 16 C.F.R. § 429.1 (1983); see *Sher, The "Cooling-Off" Period in Door-to-Door Sales*, 15 U.C.L.A. L. REV. 717 (1968); *Note, A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 YALE L.J. 618 (1969).

13. See *Regan, Justifications for Paternalism*, 15 NOMOS 189, 201-06 (1974).

by acknowledging that it is ever morally permissible to prevent a person from acting solely because he himself will be harmed by the action, one embraces paternalism (in however limited a form) and has an obligation to explain why such interference is permissible in some instances but not in others. Everyone who has written on the subject of paternalism has wrestled with this problem.¹⁴ Mill, for example, considered the prohibition against self-enslavement paternalistic, but made a considerable effort to demonstrate its moral legitimacy.¹⁵ One who believes, as Mill did and I do, that some paternalistic restrictions on contractual freedom are not only permissible but morally required, must supply a standard or principle for evaluating paternalistic arguments in particular cases; only in this way can the legitimacy of paternalism be established and its limits defined.

It would be a mistake, however, to assume that there is a single principle that best explains every paternalistic restriction in our law of contracts. There is considerable diversity among these restrictions, and while it is true that all of them seek to protect the promisor against the damaging consequences of his own agreements, they do so in different ways and for different reasons. Some paternalistic limitations on contractual freedom are best explained by considerations of economic efficiency and distributive fairness, others by the idea of personal integrity, and a third set of limitations by the familiar, though poorly understood, notion of sound judgment. None of these explanations is exclusive, and there is considerable overlap among them, but each provides the most plausible justification for one particular group or class of paternalistic restrictions in our law of contracts. Although these three classes are connected in important ways, the differences among them are real and worth emphasizing.

The principle (or principles) on which each class of restrictions rests establishes a different framework of analysis and criticism, and in this Article I shall attempt to clarify the basic differences among them. More is involved here, however, than the presentation of a classificatory scheme. The variety of paternalistic restrictions in our law of contracts reveals a complexity in its intellectual premises that, though rarely acknowledged, is one of the law's most distinctive features. I hope to bring this significant, but forgotten, complexity more clearly into view.

14. See, e.g., J. MILL, ON LIBERTY 95 (D. Spitz ed. 1975); Dworkin, *Paternalism*, in MORALITY AND THE LAW 107 (R. Wasserstrom ed. 1971); Feinberg, *Legal Paternalism*, 1 CAN. J. PHIL. 105 (1971); Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Luban, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454.

15. J. MILL, *supra* note 14, at 95.

I. Economic Efficiency and Distributive Justice

In many jurisdictions, a nondisclaimable warranty of habitability is now implied, as a matter of law, in every lease of residential property.¹⁶ Because the warranty is nondisclaimable, any agreement a tenant makes to waive its benefits will be unenforceable. It is sometimes said that if tenants were given the power to waive the warranty of habitability they might be tricked or forced into doing so—to their own disadvantage—and that the warranty has been made nondisclaimable in order to protect tenants from themselves.¹⁷

To the extent the rule barring free waiver of the warranty of habitability is acknowledged to have a paternalistic aim, its justification is a mixed one, turning in part on considerations of efficiency and in part on a conception of distributive justice. The first of these two arguments—the argument from economic efficiency—rests on the view that the prohibition against waiver of the implied warranty of habitability is, in effect, an efficiency-enhancing adjunct to the fraud remedy a disappointed tenant would have were the warranty freely disclaimable. Making an entitlement inalienable is a draconian, but sometimes efficient, way to protect its possessor against fraud or deception, and the decision to make the warranty of habitability nondisclaimable can be defended on precisely these grounds. At first glance, this view may seem implausible since considerations of efficiency are typically invoked to attack, rather than defend, nondisclaimable warranties.¹⁸ It will be helpful, therefore, to begin by recalling why nondisclaimability is generally thought to be economically objectionable.

In many transactions, various standard terms are implied as a matter of law. These legally-implied provisions establish a set of ready-made contract terms, and whenever the parties would have included similar provisions in their agreement, they are made better off by being spared the time and expense of having to do so.¹⁹ If in most transactions of a particular sort the parties prefer the standard terms the law provides, the reduction in their transaction costs is likely to exceed the increased costs incurred by the few who would prefer other implied terms and must contract out of the regime to which they will otherwise be legally subject.

16. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1080, 1082 n.58 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); *Fair v. Negley*, 257 Pa. Super. 50, 55, 390 A.2d 240, 242 (1978); Moskowitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974).

17. *Fair v. Negley*, 257 Pa. Super. 50, 56, 390 A.2d 240, 243 (1978); *Foisy v. Wyman*, 83 Wash. 2d 22, 28, 515 P.2d 160, 164 (1973).

18. See A. KRONMAN & R. POSNER, *THE ECONOMICS OF CONTRACT LAW* 253-61 (1979).

19. See Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1090 (1981), and sources cited therein.

The legal implication of standard terms is therefore perfectly consistent with the goal of promoting efficiency by reducing transaction costs. What appears indefensible from an economic point of view is the decision to make a standard term (like the warranty of habitability) nondisclaimable, for this can make a difference only where the parties would agree to waive the warranty if they could, and in every case of this sort, the prohibition against waiver seems to reduce the parties' welfare. Such a prohibition might therefore be thought justifiable only on noneconomic grounds.

The inefficiency of nondisclaimable warranties, however, is not as obvious as this overly simple argument suggests. If we regard the warranty of habitability as a device for allocating the risk that an undetected condition will render the premises uninhabitable, it is indeed difficult to understand why, from a strictly economic point of view, the warranty should be made nondisclaimable. The warranty is a form of insurance and the tenant's decision to solicit or refuse its inclusion in the lease will depend, in theory at least, on which of the parties is able, at least expense, to insure against or take steps to prevent the feared event.²⁰ This assumes, however, that when he signs the contract, the landlord does not know of any latent condition that will make the property uninhabitable. If he knows that such a condition exists, but denies that it does or fails to disclose it, the tenant's agreement to waive the warranty of habitability can hardly be characterized as an efficient allocation of risk based upon his preference for self-insurance. If the landlord has lied to the tenant, there is no economic justification for enforcing their bargain; doing so would only give others an incentive to spend more on fraud protection (a deadweight loss from society's point of view).²¹ It is no answer to say that the tenant "takes the risk" of his landlord's fraud when he agrees to waive the warranty, for this would be like saying that I take the risk of being forced to sign a contract at gunpoint when I go out unarmed and should therefore be held to any promises extorted in this way. No economist would say that it is efficient to enforce an agreement of the latter sort, and the reasons for refusing to do so are just as strong when the agreement has been procured through deliberate misrepresentation. Even if the landlord has done nothing more than fail to disclose his knowledge of the latent condition, there is no economic justification for enforcing the lease, unless his knowledge is the fruit of a deliberate and socially productive search (which seems to me unlikely for reasons I have elaborated elsewhere).²²

20. See Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90 (1977).

21. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 81 (2d ed. 1977).

22. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 9-18 (1978). If this knowledge is the fruit of a productive search, however, it should be rewarded. *Id.* at 13-14.

Of course, when the law implies a warranty, but permits the parties to vary or waive it at their discretion, a disappointed promisor has the right to rescind the contract and recover damages if his agreement was induced by misrepresentation or fraudulent concealment.²³ A disclaimable warranty, therefore, is always accompanied by a general remedy that protects the intended beneficiary of the warranty in the event he agrees to waive it after having been defrauded by the other party. The protection this general remedy affords may be inadequate, however, since claims of fraud are often difficult to prove.²⁴ To establish such a claim, the victim must show that he was intentionally deceived,²⁵ and proof of the wrongdoer's mental state can be difficult. In theory, a tenant will take these proof problems into account in deciding whether to insist on a warranty of habitability from his landlord, but those who are unfamiliar with the legal system and do not have the benefit of professional counsel may underestimate the magnitude of these problems or be largely unaware of their existence.

When a fraud has been committed, but cannot be proven, the agreement will be enforced. This is an inefficient result. Of course, if this happens only rarely—if fraud can be established in almost every case in which it occurs—the inefficiency of enforcing a few fraudulent bargains may be justified by some other, more desirable, consequence of a strict proof system (for example, its tendency to discourage vexatious lawsuits brought only to harass or blackmail the defendant). But if a large number of fraudulent bargains are enforced, the efficiencies of a strict proof system may be outweighed by its inefficiencies. One way of remedying this situation, of course, is to lower the proof requirements. But if fraud is widespread, if it can be concealed with sufficient ease, and if the victims of fraud typically lack the resources to prosecute their legal claims, lowering the proof requirement may not be enough. A more radical solution—but one that is nevertheless justifiable from an economic point of view, at least under certain conditions—is to give the victims an inalienable entitlement they cannot waive and therefore cannot be fraudulently induced to abandon. This solution has the obvious defect of preventing the parties from modifying the entitlement, even when it would be efficient for them to do so and neither has practiced fraud upon the other. But if the entitlement can be waived, if most of the waivers that are given are procured through fraud, and if the fraud can rarely be proven, the inefficiencies of a no-waiver rule may be outweighed by the greater inefficiency of enforcing too many fraudulent bargains.

23. A. CORBIN, CORBIN ON CONTRACTS § 607 (1 vol. ed. 1952).

24. Darby & Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67, 68 (1973).

25. 12 S. WILLISTON, *supra* note 8, § 1487, at 326-27.

The argument I have just sketched is not a defense of the implied warranty of habitability in particular, but only an outline of the general form such a defense might take. For the argument to have merit in this particular case, there must be some basis for believing that fraudulent deception is more likely and less easily provable here than in general. One factor that may make the danger of unprovable fraud especially great in certain situations, including this one, is the existence of a significant asymmetry in the parties' access to relevant information. Whether there is a latent condition that will render the premises uninhabitable often cannot be determined by a brief inspection, even if it is conducted with care; typically, conditions of this sort come to light only after a period of occupancy. In this respect, nonhabitability resembles other defects that appear only with use.²⁶ Even if a landlord does not himself occupy the premises he is renting, he is likely to have the benefit of whatever information previous tenants have acquired and there are a variety of ways he can prevent them from disclosing this information to prospective renters, who may find it difficult to acquire such information on their own.²⁷ In addition, the landlord's superior knowledge and continuing access to the property increase his ability to conceal latent defects in ways that are not obvious and, therefore, not easily demonstrable in a subsequent lawsuit. For these reasons, it is arguable that the landlord's informational advantage increases the likelihood of unprovable fraud in just those cases in which he has persuaded his tenant to relinquish the protection afforded by a warranty of habitability; if so, it may be economically efficient to make the warranty nondisclaimable.²⁸

26. The automobile that turns out to be a "lemon" is a familiar example. If "lemon" means "has a chronic tendency to function inadequately," then this is a defect whose detection, by definition, requires a period of use and observation. See Akerloff, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

27. The efficiency justification for nondisclaimable warranties is less compelling in the case of renewal leases, since here tenants will have easier access to information concerning latent defects. Few would argue, however, that an exception to the nondisclaimability rule should be carved out to cover renewal leases. This suggests that nondisclaimable warranties have some other justification as well. See *infra* pp. 770-74 (discussing distributive justice effects).

28. Not all consumer contracts involve informational asymmetries of this sort. In the case of newly manufactured goods, for example, defects that occur during the manufacturing process may not be discoverable by either the buyer or the seller. The seller can, of course, take precautionary measures to avoid such defects, and if it is more efficient for him to do so than for the buyer to self-insure, the parties will (in theory) agree on a warranty term that shifts the risk of the defect to the seller. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1307-13 (1981). Because the existence of a latent defect will in most cases be revealed only with use, the seller of new goods is less able to defraud his purchasers (fraud, by definition, requires knowledge of the defect, and not merely a probabilistic estimate of its existence). The economic justification for implying nondisclaimable warranties in the sale of new goods is therefore not compelling, and statutes having this effect, like the nonuniform amendment to U.C.C. § 2-316 that several states have enacted, see MD. COM. LAW CODE ANN. § 2-316 (Supp. 1982); VT. STAT. ANN. tit. 9A, § 2-316 (Supp. 1983); W. VA. CODE § 46A-6-107 (1980), are vulnerable to criticism from an economic point of view. The Magnuson-Moss Warranty, Federal Trade Commission Improvement Act, 15 U.S.C. § 2301(12) (1982), places similar

Since the same information that reveals the existence of a latent defect often suggests a method for concealing it, informational asymmetries not only increase the likelihood of fraud but also make such fraud more difficult to prove. The case for implying a nondisclaimable warranty is therefore stronger when such asymmetries exist. But this is only one factor bearing upon the frequency and legal proof of fraudulent deception. The relative wealth and sophistication of the parties is another. The more a person is willing to spend on concealment, the harder he can make it to establish that the concealment was fraudulent; the most subtle deceptions are often distinguished by their seeming innocence.

Undoubtedly, other factors bear on the question of fraud, and their complete description would represent an important step toward an economic theory of fraud, a subject curiously neglected in the law and economics literature.²⁹ The formulation of a comprehensive theory of this sort is a task beyond the scope of this Article; until we have such a theory, however, any conclusion regarding the efficiency or inefficiency of nondisclaimable warranties must remain tentative.

A second and quite different justification for refusing to permit the voluntary waiver of certain warranties, such as the warranty of habitability, follows from the idea that in some circumstances a prohibition of this sort may be an essential part of a program of distributive justice. Many, including myself, have defended the view that private law norms may legitimately be used to redistribute wealth when alternative methods of doing so are likely to be more costly or intrusive.³⁰ The distributive justification for making certain contractual entitlements inalienable by prohibiting their waiver is simply an extension of this idea and is implicit in the familiar and widely accepted notion of an adhesive contract.³¹

Where there is a striking imbalance in the bargaining power of the parties to a contract, so that one is able to dictate terms to the other—to insist that the exchange be on his terms or not at all—the contract is said to be one of adhesion. Consumer contracts are often characterized as adhe-

restrictions on the ability of sellers of consumer goods to disclaim implied warranties.

29. One notable exception is *Darby & Karni*, *supra* note 24.

30. See Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1778 (1976) (contract law as "ideal context" for judicially created altruistic order); Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980) (discussing method for achieving distributive goals through contract law); Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1016-37 (1978) (housing-code regulation of rental contracts justifiable as redistributive measure even if not demonstrably "efficient" in economic sense).

31. The classic article is Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943); see also K. LLEWELLYN, *THE COMMON LAW TRADITION* 370-71 (1960) (discussing meaningfulness of parties' consent to boiler-plate); Leff, *Contract as Thing*, 19 AM. U.L. REV. 131 (1970) (consumer contract of adhesion looks like but is not classic bargained contract); Meyer, *Contracts of Adhesion and the Doctrine of Fundamental Breach*, 50 VA. L. REV. 1178 (1964) (advocating nonenforcement of clauses not consistent with a contract's core purpose).

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sive, since the consumer has little or no control over the terms of the agreement. In recent years, courts and legislatures have intervened in the exchange process, with increasing frequency, to correct the imbalance of bargaining power that contracts of this sort appear to involve. Typically, the first step has been the judicial or statutory implication of warranty terms that increase the consumer's rights under the contract, giving him what he wants but has no power to demand.³² But so long as the party with the greater bargaining power can force the other to waive whatever liability these implied terms create, he can easily restore the original imbalance the warranty is meant to correct. At this point, a court or legislature determined to achieve greater equality in bargaining power may be tempted to make the implied warranty nondisclaimable.³³

The attack on contracts of adhesion rests upon an unstated conception of distributive fairness; though often overlooked, it is this conception that gives the attack its appeal. Many contracts are contracts of adhesion in the general sense that one party is able to dictate terms to the other, but this alone does not make an agreement objectionable. Suppose, for example, that my neighbor owns a painting I happen to covet. I offer him \$5000 for it. He responds, "\$10,000 and no warranties regarding its authenticity. Take it or leave it." Clearly, the fact that I lack bargaining power and must adhere to the terms he proposes does not by itself justify a judicial or legislative effort to tip the balance in my favor. The imbalance in this case, which stems from the fact that he owns the painting and I do not, is unobjectionable because we do not care how control over the painting is distributed.³⁴

We feel differently about the distribution of control over society's available housing stock, and inequalities of bargaining power in this context therefore seem a more appropriate target for judicial or legislative attack. The distribution of housing matters more to us than the distribution of paintings: Only the first is likely to seem important from the standpoint of most theories of distributive justice. Those contracts of adhesion that disturb us do so, then, because they reflect an underlying distribution of power or resources that offends our conception of distributive fairness; when distributive concerns are weak or nonexistent, contracts of adhesion

32. See Kessler, *The Protection of the Consumer Under Modern Sales Law* (pt. 1), 74 YALE L.J. 262, 266-72 (1964).

33. Clark & Davis, *Beefing Up Product Warranties: A New Dimension in Consumer Protection*, 23 U. KAN. L. REV. 567, 584-97 (1975).

34. If we did care about how control over paintings is distributed—and perhaps we should—we might forbid private owners of artworks from selling to anyone but public institutions or even compel them to transfer ownership for reasonable compensation. For a discussion of the relative advantages of private and public ownership of artworks, see Bator, *An Essay on the International Trade in Art*, 34 STAN. L. REV. 275, 299-301 (1982).

are less troubling and the concept of adhesion itself loses meaning.

It is therefore misleading to describe the nondisclaimable warranty of habitability as simply a device for correcting an imbalance in bargaining power. More accurately, it is an instrument of redistribution that seeks to shift control over housing from one group (landlords) to another (tenants) in a way that furthers the widely shared goal of insuring everyone shelter of at least a minimally decent sort. To achieve this goal, the warranty must be made nondisclaimable, for if it is not, tenants—poor tenants in particular—will routinely be required to waive their rights to habitable premises, thereby restoring whatever distributional inequities exist at the outset.

This argument is subject to two familiar criticisms. First, even if a nondisclaimable warranty of habitability does redistribute wealth or power from landlords to tenants, it need not necessarily improve the overall position of the poor. If enough landlords are themselves poor, the warranty may conceivably have the opposite effect, and it will in any event also work to the benefit of those who can afford housing of better quality.³⁵ Consequently, from the standpoint of a comprehensive program of distributive justice, which seeks to achieve a fair distribution of wealth in some overall sense, a limited measure of this sort may seem ineffective or even perverse.

This first criticism is unpersuasive. In the United States, wealth and the ownership of land are correlated to a sufficiently high degree that one may be used as an imperfect, but convenient, proxy for the other;³⁶ a legal rule that redistributes wealth from landlords to tenants is thus likely to result in a more equal distribution of wealth overall. More importantly, partial measures of this sort, which affect only certain groups in society, can play a distinctive and needed function in a comprehensive program of distributive justice. Even if the total wealth of society were distributed more evenly, it would still be necessary to insure that no group retained control of any vitally important resource for which it could extract a monopoly rent. To prevent the accumulation of monopoly power, redistributive schemes must take into account not only how much people own, but what they own as well. Partial measures that affect the distribution of only a single good, like housing, are therefore likely to be a necessary component of any redistributive program.

A second objection to using the nondisclaimable warranty of habitability as an instrument of distributive justice has greater force. Even if land-

35. See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1173-75 (1971).

36. J. LEWIS, *LANDOWNERSHIP IN THE UNITED STATES*, 1978, at 10 (Agric. Information Bull. No. 435, 1980).

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lords are barred from disclaiming responsibility for the habitability of property they rent, as long as they are not similarly prevented from altering other aspects of their contractual relationship with their tenants, they can easily pass along—in the form of an increased rent charge—whatever additional insurance or compliance costs they incur as a result of their expanded warranty liability.³⁷ To the extent this is true, the tenant must pay for the increased protection the warranty gives him—whether he wants it or not. Landlords, one could argue, are likely to be unaffected by a nondisclaimable warranty of habitability, since they will not bear its cost; by contrast, tenants will have to purchase a form of compulsory insurance and can only be made worse off as a result.

There are two ways of meeting this criticism. The first is to deny the unstated premise on which it rests—that the rule in question must be evaluated from the standpoint of the tenants' own preferences. Even if the costs of complying with the warranty are fully passed along, this only means that some tenants will have to pay for protection they do not want, and this is objectionable only in case the wishes of the tenants themselves should be controlling. But there may be nothing wrong with forcing tenants, including poor tenants, to spend their money on better housing (or more exactly, on insurance against the risk of inadequate housing). We recognize the legitimacy of compulsory insurance in other areas; social security is one example,³⁸ and the inalienable right to a discharge in bankruptcy is another.³⁹ Whether we should also recognize it in the area of housing will depend upon the relative importance we attach to this good and our confidence that poor tenants will not discount too sharply the value of housing insurance.

Second, even if we evaluate the warranty of habitability on the basis of what tenants actually want, the pass-along argument sketched above is less persuasive than its initial formulation suggests. The extent to which landlords are able to pass along the increased costs of a nondisclaimable warranty of habitability will depend upon characteristics of the rental market that are contingent and variable and cannot be determined in an *a priori* fashion.⁴⁰ Under certain empirically possible conditions, landlords will be able to pass along only a small portion of these costs and will have to absorb the rest;⁴¹ moreover, if alternative uses of the property are economically unattractive, the added cost to landlords of a nondisclaimable

37. Ackerman, *supra* note 35, at 1183.

38. For an account of the longstanding public consensus regarding the social security system and the growing controversy surrounding it, see M. DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* (1979).

39. See cases cited *supra* note 9; *infra* pp. 784-86.

40. See Ackerman, *supra* note 35, at 1183-85.

41. *Id.*

warranty of habitability may cause the number of available rental units to decline only slightly, if at all. When these conditions are satisfied, tenants will receive the benefit of the warranty for less than its full cost and will not be hurt through disinvestment in the rental market. In the limiting case, tenants will get something for nothing, and, short of that, they may get it for less than what they would be willing to pay. If so, they are clearly better off, from their own point of view, under a legal regime that makes the warranty of habitability nondisclaimable.

The pass-along argument used to support the claim that nonwaivable warranties are inherently self-defeating is only one example of a more general criticism applicable to all redistributive schemes that leave any contractual freedom to those whose wealth is being redistributed. Whether one elects to redistribute through the tax system or by modifying the rules of private law that fix the terms on which individuals are permitted to exchange their resources, private arrangements that shift the incidence of the tax or pass along the cost of the regulatory rule may seriously compromise redistributive objectives. This problem can be avoided only by imposing even more dramatic restrictions on the contractual freedom of the individuals involved. If we are unwilling to do this, we have no choice but to evaluate the problem from a comparative point of view and ask ourselves whether it is likely to be more serious under one scheme than another.⁴² The relevant question, therefore, is not whether the decision to use a nondisclaimable warranty of habitability as an instrument of distributive justice can be frustrated by the private contractual reallocation of its burdens, but whether the general problem of pass-along is more serious here than it would be, say, in a scheme that attempts to achieve the same goal by taxing landlords to subsidize low-income tenants. Unless one abandons the goal of providing minimally decent housing for everyone, this comparative question cannot be avoided, and it is by no means obvious that it must be decided against the implied warranty of habitability and in favor of some other redistributive technique (especially when costs of administration and enforcement are taken into account). Which technique we adopt will depend, in large part, upon empirical characteristics of the housing market; the choice, therefore, cannot be made on theoretical grounds alone.

II. Personal Integrity

The nondisclaimable warranty of habitability seems best explained by considerations of economic efficiency and distributive justice. There are, however, many paternalistic restrictions in our law of contracts that can-

42. See Kronman, *supra* note 30, at 505-06.

not be wholly, or most convincingly, explained on these same grounds. One important example is the varied group of restrictions intended to prevent an individual from contracting away too large a part of his personal liberty. The most obvious and elementary restriction of this sort is the prohibition against contracts of peonage or self-enslavement. Similar, though less dramatic, restrictions include the bar against agreements purporting to waive the promisor's right to engage in a particular profession, obtain a discharge in bankruptcy, initiate a divorce action, or breach a contract of employment and substitute money damages for the promised performance. Each of these limitations restricts a person's contractual powers by creating an inalienable entitlement of some sort, and in each case the justification for the restriction is the same: A person who would give away too much of his own liberty must be protected from himself, no matter how rational his decision or compelling the circumstances.

To justify the prohibition against self-enslavement and its various corollaries on distributive grounds, the concept of distributive justice must be expanded in ways many will think improper. These restrictions are not meant to insure the fair distribution of some scarce material resource like housing; to the extent they are concerned with distribution at all, it is with the distribution of a personal right or liberty—the liberty to use one's own self in whatever way seems best. It is possible, of course, to treat the distribution of this right in the same way one treats the distribution of rights to nonhuman resources, by assuming that, within certain very broad limits, a person's own talents and capacities represent assets belonging to a common fund, the rights to which must be allocated in accordance with the same principles of fairness that govern the distribution of material goods.⁴³ Pushed to its limits, this view would empty the notion of personal identity of all meaning and undermine the concept of independent individuality on which all programs of distributive justice rest. But more important for present purposes, even if we accept the idea that a right to dispose of one's own self must be justified on the same distributive grounds as any other entitlement, it is still unclear why this right should be limited by a prohibition against self-enslavement. One can argue, as Mill does,⁴⁴ that without such a prohibition the right to self-control may be destroyed through its alienation and conclude that a bar against self-enslavement is necessary to preserve the desired distributional pattern of personal liberties. But this begs the question: Why does a person's inability to enslave himself increase his self-control rather than diminish it? Any theory of distributive justice that purports to explain the prohibition against self-

43. See C. FRIED, RIGHT AND WRONG 100-04 (1978); Kronman, *Talent Pooling*, 23 NOMOS 58 (1981).

44. J. MILL, *supra* note 14, at 95.

enslavement assumes the answer to this question, an answer that cannot be supplied by the theory itself.

It is even more difficult to explain the bar against self-enslavement and other analogous legal restrictions in purely economic terms. Consider, for example, the inability of debtors to contract away their statutory right to a discharge in bankruptcy.⁴⁵ In certain circumstances, it may be rational for a debtor to waive his right to a discharge in return for a reduction in the cost of credit. An agreement of this sort can effectively communicate information both about the debtor's creditworthiness and the likelihood he will need to invoke the bankruptcy laws.⁴⁶ In some cases, it may also be more efficient for the debtor to self-insure against the risk of insolvency than for him to purchase insurance from his creditor (by retaining the right to avoid the debt in bankruptcy). Barring the debtor from waiving his right to a discharge forces him to employ a more expensive method for communicating such information or forego the exchange entirely (if the creditor refuses to lend on any other terms). Both results seem inefficient and are difficult to justify from an economic point of view.

The same is true of the rule barring antenuptial agreements that deprive one or both parties of the right to sue for divorce.⁴⁷ By waiving the right to bring a divorce action, an anxious suitor can convincingly convey the depth of his or her commitment (something a checkered marital record, for example, might otherwise leave in doubt). Again, the power to make an enforceable promise of this sort facilitates the communication of information regarding the promisor's sincerity and future intentions; a ban on such agreements makes this communication more difficult and may even exclude some from the marriage market altogether.

The economic argument in favor of allowing parties to make agreements of this kind is similar to the argument in favor of recognizing the validity of so-called "penal" clauses in commercial contracts. In some cases, it is claimed, a buyer or seller can persuade the other party of his trustworthiness only by promising to pay a penalty in the event he fails to perform.⁴⁸ The prohibition against penal clauses has been vigorously attacked in the law and economics literature,⁴⁹ and it is difficult to see why the same argument does not also apply to the bar against antenuptial

45. See *supra* note 9.

46. For a discussion of the difficulties created by "information impactedness," see O. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 31-37 (1975).

47. See *supra* note 8.

48. This may be true, for example, if little is known about the promisor or if his past record does not inspire confidence.

49. See A. KRONMAN & R. POSNER, *supra* note 18, at 260-61; Goetz & Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977). For a defense of the prohibition, see Rea, *Efficiency Implications of Penalties and Liquidated Damages*, 13 J. LEGAL STUD. 147 (1984).

agreements depriving one or both parties of the right to terminate their relationship by divorce.

Even the basic prohibition against self-enslavement is suspect from a purely economic point of view. If Spartacus agrees to become the slave of Claudius in return for a guarantee of food, shelter, and education for his children, there is no a priori basis for thinking the exchange inefficient. The welfare of both parties may be increased by an arrangement that gives one irrevocable control over the labor of the other (subject only to a few broad restrictions designed to insure the slave's safety and physical health) in return for certain contractually specified benefits. If the slave lacks the managerial skills needed to exploit his own labor most productively, it is especially likely that an arrangement of this sort will be efficient.⁵⁰

There is, however, at least one plausible economic argument for the prohibition against self-enslavement. Like the nondisclaimable warranty of habitability, the bar against self-enslavement can be viewed as a second-best device for preventing certain forms of deception and duress that cannot be attacked more directly. If we assume that in most cases a person would not contract into slavery unless he were illegitimately compelled to do so, but that such compulsion is difficult to detect and cannot easily be brought under existing rules regarding duress and unconscionability, a flat prohibition against such agreements may be the only administratively feasible way of preventing illicit coercion.⁵¹ There is, however, something unsatisfying about this argument: Even if we had an inexpensive mechanism that enabled us to discriminate, with complete confidence, between coerced contracts of enslavement and uncoerced ones, many, including myself, would still favor the prohibition of all such agreements. This suggests that our intuitive opposition to self-enslavement rests upon considerations that the argument just sketched does not capture or adequately express.

The effort to justify the prohibition against self-enslavement and its legal corollaries is made more difficult by the fact that many enforceable agreements have consequences similar to those the restrictions in question forbid. For example, although an antenuptial agreement waiving either party's right to sue for divorce is unenforceable as a matter of law, an agreement that penalizes the party initiating a divorce action by depriving him or her of any interest in the other's estate may be honored, depending

50. See Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 501 (1980); see also R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS* (1974) (discussing possible efficiencies of American slave system); Galenson, *The Market Evaluation of Human Capital: The Case of Indentured Servitude*, 89 J. POL. ECON. 446 (1981) (defending efficiency of indentured servitude). But see Kronman, *Wealth Maximization as a Normative Principle*, 9 J. LEGAL STUD. 227, 241-42 (1980) (criticizing Posner's view).

51. A. KRONMAN & R. POSNER, *supra* note 18, at 259; Feinberg, *supra* note 14, at 119-20.

upon the circumstances and the exact terms of the agreement.⁵² Beyond a certain point, of course, there is little difference between simply waiving the right to sue for divorce and penalizing its exercise, and it is puzzling that the law so clearly forbids one, but is increasingly tolerant of the other. Similarly, although a loan contract waiving the debtor's right to a discharge in bankruptcy is legally invalid, a secured transaction in which the debtor uses exempt property as collateral is not.⁵³ The purpose of a bankruptcy discharge is to give the debtor a fresh start in his financial affairs, but the exemption of certain property from the bankrupt's estate—historically, a much older feature of bankruptcy law than the debtor's right to a discharge—has the same purpose. It is not at all clear why a debtor should be able to compromise his fresh start by contracting away his exemption privileges, but not his right to a discharge. Even the prohibition against peonage or self-enslavement, as well entrenched as it is, permits a variety of employment relationships that exhibit many of the same characteristics.⁵⁴ In short, the limits each of these "absolute" prohibitions imposes on contractual freedom may be approached in varying degrees; the result is a gray zone of increasing restrictiveness, rather than a bright line crisply demarcating the permissible from the impermissible. Still, one wonders, why are there any restrictions at all?

The first step in answering this question is to clarify the meaning of self-enslavement. Every executory contract limits the freedom of the parties by creating an enforceable obligation, on both sides, to perform or pay damages: Once an individual has made a contractually binding commitment, his alternatives are limited to these two (assuming the other party is not himself in breach). The distinguishing mark of a contract of self-enslavement is that it purports to take away the latter alternative. From a legal point of view, it is not the length of service that makes a contract of employment self-enslaving, nor is it the nature of the services to be per-

52. In the past, such agreements were routinely invalidated on the grounds that they represented "an invitation to promote discord and instability in marriage"; the current trend, however, "is for courts to analyze the terms of these clauses on a case to case basis and uphold their validity if they are fair and reasonable." *Eule v. Eule*, 24 Ill. App. 3d 83, 87, 320 N.E.2d 506, 509 (1974); see *Buettner v. Buettner*, 89 Nev. 39, 505 P.2d 600 (1973); *Unander v. Unander*, 265 Or. 102, 506 P.2d 719 (1973); *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Hudson v. Hudson*, 350 P.2d 596 (Okla. 1960).

53. There is one important exception: A debtor in bankruptcy may avoid a nonpossessory, non-purchase-money security interest in household furnishings, wearing apparel, professional implements and certain other items of personal property "[n]otwithstanding any waiver of exemptions." 11 U.S.C. § 522(f) (1982).

54. The domestic service contract is one example. See Havighurst, *Services in the Home—A Study of Contract Concepts in Domestic Relations*, 41 YALE L.J. 386, 400-05 (1932) (where one party has agreed to care for the other for life, even justified decision to leave may deprive the employee of any right to compensation for benefits conferred). A covenant not to compete with one's employer during and after the period of employment is another example. 6A A. CORBIN, CORBIN ON CONTRACTS §§ 1379-1403 (1962) (discussing restraint of trade); 14 S. WILLISTON, *supra* note 8, §§ 1628-1664B (same).

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formed; even a contract of short duration that calls for the performance of routine and unobjectionable tasks is a contract of self-enslavement and therefore legally unenforceable if it bars the employee from substituting money damages for his promised performance.⁵⁵ The law will not permit an employee to contract away his right to “depersonalize” a relationship by paying damages in the event he chooses to breach. Whatever its other terms, an employment contract is enslaving if it gives the employer a right to compel specific performance of the agreement.⁵⁶

An antenuptial agreement waiving the right to sue for divorce can be described as a contract of self-enslavement in just this sense. The parties to a marital contract have considerable freedom to define in advance the nature and extent of their financial responsibilities in the event of a divorce or separation, but neither can give the other the power to compel specific performance by waiving the right to terminate the relationship through divorce.⁵⁷ Here, as in the employment context, the right to substitute damages for the actual performance of the contract is inalienable, and any agreement purporting to forfeit this entitlement is invalid as a matter of law.

Only the prohibition against waiving one’s right to a discharge in bankruptcy cannot be described in similar terms; since the performance called for in this case is the satisfaction of a monetary obligation, the relationship between the parties is depersonalized from the outset. However, with this one exception (to which I shall return),⁵⁸ the prohibition against self-

55. This precise characteristic has been held to be the distinctive mark of the peonage system and other forms of involuntary servitude. See cases cited *supra* note 7. The peonage relationship—which often has a contractual origin—was distinguished from other legitimate employment contracts on the grounds that the peon not only agreed to work for his master for a fixed or indefinite period of time, but also gave up his right to quit whenever he wished and avoid the contract by making a compensatory payment of money damages.

56. This theme links the Peonage Cases, 136 F. 707, 708 (E.D. Ark. 1905), to the well-established doctrine of contract law that an employee’s obligations will not be specifically enforced, even if the parties have provided that they shall be. 11 S. WILLISTON, *supra* note 8, § 1423. The well-known case of *Lumley v. Wagner*, 42 Eng. Rep. 687 (Ch. 1852), is not to the contrary. Although the injunction awarded in that case prohibited the defendant from singing in other theaters, it did not subject her to the personal authority of the plaintiff; like money damages, the injunction in *Lumley* caused the defendant only economic loss (albeit a substantial one).

An employee may specifically enforce an employment contract against a corporate employer. *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959). This is consistent with the view that the right to depersonalize a contractual relationship is inalienable, since a corporation, though a legal person, lacks the elements of personal integrity this right protects. Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641, 1652-55 (1982) (arguing that rights of corporation flow only derivatively from corporate personality).

In Canada, labor contracts are specifically enforceable against unions, which, like corporations, are deemed to lack the elements of personal integrity necessary to support the right to depersonalize contractual relationships. *International Bhd. of Elec. Workers v. Winnipeg Builders Exch.*, 65 D.L.R.2d 242 (1967).

57. See *supra* note 8.

58. See *infra* pp. 784-86.

enslavement and its analogues all appear to have the same goal—to prevent the promisor from contracting away the right to depersonalize his relationship with the other party by substituting damages for the performance he originally promised.

The prohibition against such contracts is best explained, in my view, by the special threat they pose to the promisor's integrity or self-respect. The nature of this threat is revealed with particular clarity when the promisor's own values have changed dramatically since he entered the contract. To see why this is so, it is useful to draw a distinction between what I shall call disappointment and regret.

Every contractual obligation is undertaken on the basis of certain assumptions about the world (that the fall wheat harvest will be a poor one, that Israel and Egypt will remain at peace, and so forth). If an assumption proves to have been mistaken and one of the parties to the contract is deprived of the benefit he expected, we say he is disappointed: Things have not worked out as he wished. It does not follow, however, that a disappointed promisor will regard his contract as an irrational venture; given what he knew at the time he made the contract, it may have been perfectly rational for him to accept the risks associated with it. A mistaken assumption need not give the promisor grounds for questioning the rationality of his initial decision.

Mistakes of this sort, however, are not the only reason a person may subsequently wish he had refrained from making a particular contract.⁵⁹ When someone assumes a contractual obligation, he generally has certain goals he believes will be promoted by the arrangement. If his goals change, the contract may lose its original attractiveness and become pointless (or even reprehensible) from the promisor's point of view, despite the fact that all his assumptions about the world have proven accurate. Even if the fall wheat crop is as bountiful as I predicted, making my futures contract hugely profitable, I may wish that I had not made the agreement if, in the meantime, I have experienced a religious conversion that causes me to look on every worldly endeavor as a polluting distraction. When a person wishes that he had not made a particular contract because his goals have changed, he feels regret, rather than disappointment.

There is an important difference between regret and disappointment. Disappointment does not by itself undermine a person's confidence in the rationality of his own choices; regret can and often does. Whether it is rational for a person to pursue a particular course of action depends upon the goals he happens to have; these form the framework within which the

59. Charles Fried notes the existence of different types of mistakes, including mistakes regarding the promisor's own future interests and desires, but fails to recognize the special moral significance of mistakes of the latter sort. C. FRIED, *CONTRACT AS PROMISE* 19-21 (1981).

instrumental efficacy of his actions must be assessed. If a person is merely disappointed by the way things turn out (he expected the wheat crop to be significantly larger), but his goals remain unchanged, the framework within which he retrospectively assesses the rationality of his contract will be the same as the one within which he concluded it was rational to make the contract in the first place. A person may of course wish that he had not made a contract that has become burdensome as a result of events he believed would not occur. But if there is continuity in the goals that shape his practical deliberations, his disappointment will not lead him to doubt the rationality of the original decision, given what he then knew; under these circumstances, a person is likely to feel that he did the best he could; at most, he may blame himself for having terminated his search for information short of the point that was economically justifiable and ascribe responsibility for his misfortune to the uncertainties that plague all human conduct.

If, however, a person's goals have changed significantly, his earlier decision may now appear irrational, for his original aims no longer provide the framework for his deliberations. To assess the rationality of his own actions within the context of his earlier (now abandoned) goals, a person must not only forget what he has learned about the world in the meantime; he must also suspend his present values and ask himself what course of action would be rational for a person with the values he once had. This is a much more difficult task, for it requires the imaginative suspension of the evaluative framework that presently determines the ends to which his knowledge of the world shall be put. Some people are able to understand empathetically the system of goals that guided them at an earlier point in their own lives—much as a sociologist or anthropologist is able to empathize with the subjects of his inquiry, who often belong to a very different culture—and to understand the meaningfulness of their experience from within. Even in the latter case, however, our powers of empathy are limited,⁶⁰ and they seem even more limited when we attempt to empathize with the selves we once were. Perhaps we feel our own personal commitments more threatened in the one case than in the other; we easily accept the fact that some people lead lives directed toward goals different from our own, but we often find it difficult to acknowledge that we ourselves once had significantly different values. Whatever the reason, a dramatic change in goals weakens our ability to review sympathetically our past decisions within a now altered or abandoned framework of ends; the more radical the change, the more difficult such sympathy will be.

60. It is particularly difficult for an individual to empathize with "people who belong to class, racial and sexual groups different from his own." Kennedy, *supra* note 14, at 647.

When a person cannot overcome the distance he feels from his own earlier goals, when he cannot view them in the detached but empathetic way a sociologist might, actions he once thought rational may no longer appear so. From the standpoint of his present values, which he cannot shake off or suspend, his past actions may seem pointless or evil; in this case, he is likely to regard his earlier decisions as a foreign element whose continuing influence appears senseless from the standpoint of his present goals. This can be especially demoralizing.⁶¹ Although there are countless ways in which a person's aspirations can be defeated by the senselessness of the world, if he himself is somehow responsible for the defeat, he may feel not only that he has been overborne by reality, but that he has, in Aristotle's words, failed to be a friend to himself.⁶² Self-betrayal of this sort weakens a person's confidence in his ability to make lasting commitments and guard the things he cares for,⁶³ and this, in turn, strikes at his self-respect. When a person's goals change, his past decisions can have this effect because these decisions remain his own, even though the normative standpoint from which they once seemed rational has become inaccessible. However strongly he now regards some earlier decision as a foreign element, lodged in his life and exerting an irrational influence over it, a person can never entirely disown the decision (without a considerable amount of bad faith) as an arbitrary piece of fate, like cancer at an early age.⁶⁴

61. See J. RAWLS, *A THEORY OF JUSTICE* 440 (1971) ("plagued by failure and self-doubt," we cannot "continue in our endeavors").

62. ARISTOTLE, *NICOMACHEAN ETHICS* *1166b 25-30.

63. See Frankfurt, *The Importance of What We Care About*, in *SYNTHÈSE* (forthcoming) (discussing moral significance of having specific cares and acting on them).

64. The distinction between disappointment and regret is not one that economists emphasize or perhaps are even capable of recognizing. From an economic point of view, regret and disappointment amount to the same thing. When an individual commits himself to do something, he makes a number of assumptions about the likelihood of various contingencies; some of these assumptions are related to his own subjective states (the likelihood that he will be alive when the time for performance comes, that he will have the same interests and desires). In a strictly economic sense, these assumptions are no different from those an individual makes about the likelihood of various objective states of affairs (that the cow he is selling is sterile, that the King's coronation will be held as scheduled). Assumptions of both sorts may be correct or incorrect, and an error of either kind can reduce the expected value of a contract for one or both parties. Economically, there is no distinction between having been wrong about the world and having been wrong about oneself.

Because a rational person wishes to avoid being wrong in either respect, before he makes a contract he will take into account the fact that his own interests and desires may change in a way that will render the contract worthless. He will assign a probability to this event, just as he assigns a probability to the occurrence of various objective contingencies. Consequently, an economist might argue that, even if a person's desires and interests change, he has no basis for doubting the rationality of his original decision as long as he did his best to ascertain the likelihood of such a change.

If this view were correct, the distinction I have drawn between regret and disappointment would collapse. But the economist's view of the matter leaves out an important fact. When a person considers the consequences of a possible change in his goals, he necessarily does so from the standpoint of the goals he then has; the significance he assigns to a change of this sort is determined by his present interests and desires. If an important change does occur, there is nothing to guarantee that his prior

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Normally, when a person makes a contract he later comes to regret, he is free to abandon the agreement and simply compensate the other party for his loss. The damages the promisor must pay represent the cost of his own decision, and the obligation to pay them is a continuing reminder of former goals he has since modified or abandoned. A reminder of this sort may intensify the promisor's regret and make it more difficult for him to forget what now seems like an irrational decision, but this cannot be avoided entirely as long as we adhere to the basic rule that a contracting party must pay for the losses caused by his own unexcused breach.

If, however, the promisor is required to perform as he had originally agreed—if he is barred from substituting damages for the specific performance of his obligations—his feelings of regret are likely to be intensified, particularly when performance entails some ongoing personal cooperation with the other party or subjection to his personal supervision. If the breaching promisor must continue to work or live with the other party and abide by the terms of a cooperative arrangement he now regrets, he will almost certainly find it more difficult to distance himself from his original values. He is likely, as a result, to feel more directly tied to the goals he has repudiated and to be more painfully reminded of their continuing influence in his life. By substituting damages for performance, the promisor gives his original commitment an abstract form less closely linked to the specific goals that led him to make the commitment in the first place; the edge of his regret is dulled and its disabling consequences ameliorated. If he cannot distance himself from the contract by depersonalizing his relationship with the other party, the promisor's regret is likely to be more intense and its effects more serious; the right to depersonalize a contractual relationship is an aid to forgetfulness, which—within proper limits—is a condition of moral health.

When the promisor's own values have changed dramatically, the compulsory performance of a contract requiring his personal cooperation with the other party may pose a special threat to his integrity or self-respect. This is not the only situation, however, in which a moral danger of this sort may exist. Suppose, for example, that an employee working for a pharmaceutical concern discovers that his company is selling drugs used to produce a lethal chemical weapon, a fact he did not know when he entered the contract. If the employee believes that continuing to work for the company is inconsistent with certain deeply-held moral convictions, the violation of which would be a serious blow to his self-respect, he should

evaluation of its consequences will still seem rational. The alteration in his deliberative framework that results from the change may preclude any empathic identification with his earlier point of view. Economic theory ignores the important fact that some changes that upset a person's expectations are not changes within a fixed framework of interests and desires, but are changes in the framework itself.

be permitted to quit and pay his employer damages for whatever loss the company suffers. Perhaps the employee will regard even the payment of damages as a morally compromising act, but he may well consider his continued employment a more personal and therefore more debasing contribution to a program he thinks immoral. The law assures the employee's right to choose between these alternatives by refusing to enforce any provision in his contract that purports to confer a right of specific enforcement on the employer. We might, of course, protect the employee's moral integrity by relieving him of any duty either to perform or pay damages, but a remedy with such extreme consequences would lend itself to exploitation and tend to undermine the stability of contractual relations generally.⁶⁵ To this extent, the bar against self-enslavement may be viewed as a compromise that protects employees from the special debasement sometimes associated with specific performance of an obligation, but leaves them exposed to the moral risks entailed by any contractual commitment made on the basis of incomplete information about the world.

Some contracts, of course, are specifically enforceable, even though the parties have not included a provision to this effect. Contracts for the sale of unique goods are the most notable example.⁶⁶ This may seem puzzling, however, for here, too, actual performance can be demoralizing in a way that compensation is not. Suppose, for example, that a seller of machine parts, unobtainable from any other source, discovers that his buyer intends to use them for a purpose the seller considers immoral. If the machine parts are unique, the seller may be ordered to perform despite his moral misgivings and a strong, ethically based preference for monetary compensation. To be sure, the seller can (in theory) buy his way out of the contract if his financial resources are adequate,⁶⁷ but so can an employee who has voluntarily enslaved himself; the power to buy one's way out of an obligation is therefore insufficient to explain why specific performance is granted in one case but not the other.

Part of the explanation for this difference in treatment is that contracts of employment are more difficult to specifically enforce because they require greater cooperation by the defendant and therefore involve an element of moral hazard that contracts for the sale of goods do not.⁶⁸ There is, however, another reason why courts are more willing to compel per-

65. A more limited form of protection would require the employer to disclose in advance those aspects of the job he could reasonably expect to be morally controversial. Where no disclosure has been made, the employee would be free to void the contract at his discretion.

66. Kronman, *supra* note 10, at 355-65.

67. *Id.* at 372-73.

68. 11 S. WILLISTON, *supra* note 8, § 1423, at 783 ("The proper performance of the services to the best of the defendant's ability is uncertain and difficult to gauge. And any attempt to overcome these difficulties might involve too serious an infringement of personal liberty to be tolerable.")

formance in the latter case. Long personal service under the direction of another and the payment of money are in reality poles of a continuum; one is the least, and the other the most impersonal way of meeting a contractual obligation. The transfer of property falls somewhere in between. Many sales contracts do not require any personal cooperation or even contact between the parties and are therefore closer to the pole of maximum impersonality represented by money damages. The more impersonal an act, the less likely it is to threaten an actor's integrity or self-respect; taking this into account, the specific enforcement of contracts for the sale of goods seems more defensible from a moral point of view than its traditional justification on grounds of administrative convenience might suggest.

Finally, how is the bar against waiving one's right to a discharge in bankruptcy to be explained? Since a waiver of this sort merely creates a continuing obligation on the part of the promisor to pay his pre-bankruptcy debts, it might not seem to pose the same threat to his integrity as other forms of self-enslavement, which require the performance of more personal services. In fact, however, the idea of regret, as I have defined it, does help explain the institution of bankruptcy and the inalienability of the debtor's right to a discharge.

Clearly, a large debt can be a source of regret even though its payment does not require a continuing personal relationship between the parties. It might therefore seem sensible to measure the magnitude of the debtor's potential regret by the magnitude of the debt itself and to adopt a rule relieving him of the duty to repay any debt greater than some fixed percentage of the total value of his estate.⁶⁹ At first glance, a rule of this sort seems absurd: If a debt could be avoided simply because it was equal in amount to, say, twenty percent of the debtor's estate, large loans would become unenforceable. But bankruptcy is a rule of just this sort: If the debtor's obligations exceed his assets—that is, equal more than one hundred percent of the value of his estate—he may petition himself into bankruptcy and be relieved of all dischargeable claims against him.

The right to a discharge is usually justified in terms of the debtor's need for a fresh start, unhampered by earlier debts.⁷⁰ One reason for giving the debtor a fresh start is to counteract the self-hatred he may feel, having mortgaged his entire future in a series of past decisions he now regrets. Whatever its macroeconomic function,⁷¹ the bankruptcy discharge has a

69. Such a rule would be an adjunct to and not a substitute for the bar against other forms of self-enslavement, which would apply regardless of the sums involved.

70. *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934).

71. See Weistart, *The Costs of Bankruptcy*, 41 *LAW & CONTEMP. PROBS.*, Autumn 1977, at 107, 111.

moral purpose as well—to restore to the debtor some measure of confidence in his capacity to arrange his future as he wishes, free from the dead hand of the past. Without such confidence, the debtor may lose even that minimum of self-respect that is a condition for his taking an interest in himself and his own life. To this extent, the right to a discharge in bankruptcy serves the same general goal as the right to depersonalize a contractual relationship by substituting damages for performance, and the inalienability of both can be explained on similar grounds.⁷² Bankruptcy reveals our acceptance of the fact that beyond a certain point, the sheer magnitude of a person's debt may be demoralizing. The rules of bankruptcy thus supplement, in a needed way, the other prohibitions against self-enslavement I have discussed.

III. Judgment and Moral Imagination

In addition to the two forms of paternalism I have described, it is possible to distinguish a third. The restrictions that compose this third group include some that are paternalistic in the most literal sense; I have in mind various limitations on the enforcement of promises made by children and other incompetent persons. These restrictions all differ in one important respect from those I have characterized as prohibitions against self-enslavement. The latter bar certain agreements without qualification: Under no circumstances will the law recognize the validity of a promise to become the slave of another or to abstain from bringing a divorce action against one's spouse. Agreements of this sort are prohibited because of their content; it makes no difference whether they have been entered into impulsively and without consideration of the consequences, or after careful deliberation. By contrast, the class of restrictions I now wish to consider—exemplified by the rule that a child's contracts will generally not be enforced against him—seems primarily concerned with defects in the promisor's reasoning process.

Restrictions belonging to this third class characteristically prohibit the enforcement of agreements only for a time, often referred to as a "cooling-off" period, after which the restraint is lifted. The imposition of a mandatory cooling-off period insures that the promisor has an opportunity to reflect on his commitment and to withdraw from the contract if he wishes. A temporary suspension of the promisor's contractual powers reduces the likelihood of an overly hasty decision and thus helps counteract what I have described as a defect in his reasoning process; its purpose is to prevent the promisor from binding himself too quickly or while his judgment is impaired. Unlike the prohibition against self-enslavement,

72. I am indebted to Jonathan Bennett for suggesting this similarity to me.

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however, the imposition of a cooling-off period does not by itself guarantee (or forbid) any particular substantive result.

In reality, the contractual incapacity of children also creates a mandatory cooling-off period of the sort I have just described. Since this may not be obvious, it is appropriate to begin by recalling the precise nature of the limitations that constrain children in their contractual dealings. There are, of course, certain contracts that children cannot make under any circumstances and that are enforceable neither by nor against them. An employment contract that fails to meet the requirements of state or federal statutes regulating child labor is one obvious example.⁷³ In addition, children are subject to a more general limitation on their contractual powers that applies even when the contract in question is wholly unobjectionable. With the money he has saved from his allowance, a twelve-year old can purchase and use an expensive airplane ticket, but if he comes to regret the decision, he cannot recover his money from the airline.⁷⁴ Similarly, in many states, if a minor pays for an automobile with cash, he must return the car and compensate the seller for depreciation and the value of its use in order to rescind the contract and recover the money he has paid.⁷⁵ By contrast, if a minor makes a contract to purchase an automobile or airline ticket, but changes his mind before the sale is completed, the law permits him to disaffirm the contract without liability.⁷⁶ This power of avoidance cannot be contracted away; so long as he has not yet performed his end of the bargain, a child is free to renounce his promise without cost, and there is no legally effective means by which he can waive this privilege.

If, however, a child wishes to honor his contract, he may do so; the other party (assuming he is an adult) will then be bound to meet his obligations under the agreement.⁷⁷ This creates an asymmetry in their relationship: The child may, at his discretion, enforce the contract, but the other party cannot enforce it against him. In practical effect, the child has an option to enforce the contract any time after its formation and before its revocation. During this period—which may aptly be described as a cooling-off period—the child has an opportunity to reconsider the wisdom of his original decision (on his own or with the benefit of adult counsel,

73. See, e.g., 29 U.S.C. § 212 (1976); CONN. GEN. STAT. § 31-23 (1983).

74. *Vichnes v. Transcontinental & W. Air, Inc.*, 173 Misc. 631, 18 N.Y.S.2d 603 (App. Term 1940).

75. *Sparandera v. Staten Island Garage, Inc.*, 117 Misc. 780, 193 N.Y.S. 392 (Munic. Ct. 1921); *Gaither v. Wallingford*, 101 Or. 389, 200 P. 910 (1921).

76. The power of disaffirmance is described in 2 S. WILLISTON, *supra* note 8, §§ 222-239. An exception to this power arises in the case of "necessary" goods. *Id.* §§ 240-244.

77. See *id.* § 226.

invited or uninvited) and to withdraw from the contract if he wishes.⁷⁸

Clearly, a cooling-off period of this sort affords only partial protection against the dangers of a rash or ill-considered decision, and a child can, to some extent, negate its benefits simply by making an exchange rather than contracting to do so.⁷⁹ But there can be little doubt that the rule barring enforcement of a child's contracts (except at his option) works to protect children from their own shortsightedness and lack of judgment.

Indeed, something like this would appear to be the intended purpose of all legally required cooling-off periods. For example, the statutory rule (found in many states) that a couple may not marry until a stated period of time has passed after the issuance of their license⁸⁰ and that, once married, they may not obtain a divorce decree before the end of a similar cooling-off period,⁸¹ is usually justified on the ground that important decisions should not be made in haste or under the influence of a powerful and potentially distorting passion. Analogous reasons could be given to justify the imposition of a cooling-off period in certain consumer transactions, such as door-to-door sales, where the consumer's normal defenses are likely to be relaxed and his judgment impaired.⁸² Diverse as the situations are to which these cooling-off periods apply, the objective in each case is the same: to encourage sound judgment and reduce the influence of passion and whim on the contractual commitments a person makes.

What presuppositions lie behind the paternalistic protection children receive in their contractual dealings with others, and why is it sometimes thought permissible to treat adults in the same fashion (by giving them an option to avoid, without cost, promises that would otherwise be enforceable)? Some have argued that the law gives children and other incompetent persons—the drunk and insane—a right to avoid their contracts in order to protect them from fraudulent manipulation by those whose judgment is not similarly impaired.⁸³ If this were their sole purpose, these

78. If a child reaches majority before completing performance of a contract, he may be required to pay for any goods he has already received under the contract if he sells, uses, or retains them for an unreasonable time. *Id.* § 239.

79. J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* § 126 (1970). A child's ability to harm himself through imprudent purchases is limited by the resources he happens to have at any given moment, resources that usually take time to accumulate. The time required to save for a substantial purchase itself functions as a kind of cooling-off period by providing an opportunity for reflection and by increasing the likelihood of parental intervention. If a child were allowed to make binding contracts, his spending power—and hence his capacity to harm himself by spending foolishly—would no longer be constrained by the limits of his present wealth. And since a contract can be made in an instant (unlike accumulation, which requires time), parents would have less control over the purchases their children make.

80. *E.g.*, CONN. GEN. STAT. § 46b-27(a) (1983); N.Y. DOM. REL. LAW § 13-b (McKinney 1977).

81. *E.g.*, CAL. CIV. CODE § 4514 (West 1983); CONN. GEN. STAT. § 46b-67(a) (1983).

82. *See supra* note 12.

83. *Henry v. Root*, 33 N.Y. 526, 536 (1865) (law aims to "protect infants or minors from their own improvidence and folly, and to save them from the depredations and frauds practised upon them

special restrictions might be justified on economic grounds as a supplement to the general efficiency-enhancing prohibition against fraud. But the rule that a child may avoid his contracts if he wishes is intended to do more than protect him against adult exploitation. A child possesses this power of avoidance even when there has been no fraud or overreaching, and both courts and commentators agree it is appropriate he have such power.⁸⁴ Whether or not he has been misled, a child may show poor judgment in making a particular contract, and it is protection against his own ignorance and immaturity—not merely the advantage-taking of others—that the law affords. This view, though familiar and widely accepted, is difficult to justify on economic grounds alone. Why should the general presumption that a person is the best judge of his own interests be suspended in the case of children (as well as drunks, married persons contemplating divorce, and purchasers of goods sold door-to-door)? To answer this question, we must first give some account of the nature of judgment itself, a subject neglected in the law and economics literature (and elsewhere).⁸⁵

When we say that a child (or anyone else) lacks good judgment, we most often mean that he lacks the capacity to evaluate critically his own interests and desires. A child obviously has interests and desires; what he lacks is skill in determining which of them should be encouraged rather than suppressed, and in predicting how they are likely to influence his own character (the kind of person he becomes and the sorts of things he cares about). It is much easier to say what this skill is not than to state precisely what it is. To begin with, good judgment must be distinguished from simply having certain desires, however admirable or meritorious they may be. Judgment, as I am using the term, involves a critical reflection on one's interests and desires and hence presupposes some distance from them; indeed, we associate judgment with sobriety and dispassion—with states of relative desirelessness—and think of judgment as requiring disengagement from the immediacy of desire. This is why it is misleading to characterize judgment as a desire of any sort, even a second-order desire to cultivate or suppress other, more elementary ones (like the desire to smoke or listen to Mozart).⁸⁶ Our second-order desires may

by the designing and unprincipled").

84. RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981); 2 S. WILLISTON, *supra* note 8, § 226. *But see* Navin, *The Contracts of Minors Viewed from the Perspective of Fair Exchange*, 50 N.C.L. REV. 517 (1972) (criticizing automatic voidability of minors' contracts).

85. One important exception is the work of Hannah Arendt. My own views regarding the nature of judgment have been deeply influenced by her original and provocative remarks on the subject. *See* H. ARENDT, *LECTURES ON KANT'S POLITICAL PHILOSOPHY* (1982); 2 H. ARENDT, *THE LIFE OF THE MIND* 255-72 (1978); H. ARENDT, *The Crisis in Culture: Its Social and Political Significance*, in *BETWEEN PAST AND FUTURE* 197, 219-26 (1968).

86. For a discussion of the moral significance of the distinction between first- and second-order

themselves show poor judgment and merely by acting from such a desire, a person does not demonstrate that he is capable of the dispassion judgment requires.

Judgment must also be distinguished from the instrumental rationality involved in the choice of means, or the comparison of different methods for achieving a given goal. In deciding which goals to pursue, we normally take instrumental considerations into account, but it is wrong to think that a choice of ends can ever be made on the basis of such considerations alone. Indeed, the opposite seems more true: The opportunity cost we attribute to the pursuit of one goal is always a function of the value we ascribe to other goals, and, hence, any conclusion we reach regarding the instrumental rationality of a particular course of action will rest upon noninstrumental assumptions about the intrinsic merit of the different ends we might embrace. To deliberate about means we must first have deliberated about ends, and only a person who shows skill in his choice of ends can be said to possess judgment. If a person lacks this skill, even the greatest talent for instrumental reasoning cannot make up the difference; to such a person we ascribe shrewdness, but not good judgment.

Because judgment concerns the choice of ends rather than means, one might think that it is not a form of deliberative rationality at all, but a kind of intuitive insight. On this view, a person has good judgment if he simply sees which course of action is best, even though he may not be able to give an account of the reasons for his choice.⁸⁷ But this view also seems wrong. Judgment is skill in deliberation—it is the skill of deliberating well—whereas intuition brings deliberation to an end and is something altogether different from it. We tend to think of judgment as an art and speak of someone exercising careful judgment; but intuition is not an art, and the term “careful intuition” is a contradiction in terms.

Good judgment, then, is not simply intuitive insight, nor is it a form of instrumental rationality, and it cannot be equated with the possession of certain desires (even desires of a higher order that have other desires as their object). Can anything positive be said about judgment and the role it plays in our practical deliberations? Judgment is, I believe, best thought of as the faculty of moral imagination,⁸⁸ the capacity to form an imaginative conception of the moral consequences of a proposed course of action and to anticipate its effect on one's character. A person has good judgment if this faculty is developed and strong, poor judgment if it is not. The concept of moral imagination is vague, and I shall attempt to explain

desires, see Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5 (1971).

87. See ARISTOTLE, *supra* note 62, *1142a 20-30 (prudence has as its object “the ultimate particular fact, of which there is perception but no scientific knowledge”).

88. See 2 H. ARENDT, *THE LIFE OF THE MIND* 257-61 (1978).

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more clearly what I mean by it.

When a person is considering a particular course of action, he may ask a variety of questions regarding its moral acceptability. Is it permitted (is the action consistent with his moral and legal obligations)? Does the action conform with his personal ideals? What effect is it likely to have on his character (will the action change him and if so, in a direction he approves)? To answer these questions, he must construct a mental image of the action and, then, with this image as an aid, attempt to determine the moral effects the action is likely to have.⁸⁹

The construction of such an image is a synthetic operation.⁹⁰ Even simple actions can rarely be evaluated merely by adding the (positive or negative) value of their components. The process in question may more aptly be compared to the construction of a work of art. To be successful, an artist must gather the elements of his work into a meaningful unity that strengthens the internal relations among them. Similarly, a person attempting to anticipate the moral significance of an action must construct a mental picture that brings out the contextual importance of each element and clarifies the transforming, as distinct from merely additive, effects the action may have on his character as a whole.⁹¹

Judgment, then, is a form of imagination; it is the creative ability to anticipate, in thought, the moral effects of an action viewed in the context of a person's character and aspirations. This raises a difficulty, however. We associate judgment with objectivity, but, because imagination involves an important element of creativity, we tend to regard it as a personal or subjective quality; indeed, when we are told that a person has a vivid imagination, we are likely to assume that he is out of touch with reality, with the world as it is objectively constituted. Children, for example, are often said to have powerful imaginations, which they lose by degree as they are introduced to the objective world of adulthood. It would be a

89. I use the term "moral" in a broad sense to include everything that bears directly on one or another of the questions enumerated above.

90. See I. KANT, *CRITIQUE OF PURE REASON* *139-42, B178-81.

91. Philosophers have noted the similarity between moral and aesthetic creativity. Berkeley, for instance, argues that the moral quality of the world is improved by the evil it contains, much as a single spot of color can improve the overall impression a painting makes. G. BERKELEY, *THE PRINCIPLES OF HUMAN KNOWLEDGE* §§ 152-156, in 2 *OF THE WORKS OF GEORGE BERKELEY, BISHOP OF CHAYNE* 111-13 (A. Luce & T. Jessop eds. 1949). If the moral significance of events were merely additive, the positive or negative value of each being contained wholly in itself, the world would necessarily be a better place without any evil at all; for evil to represent an improvement from the moral point of view, the ethical meaning of the world must have the same kind of synthetic unity that a painting or novel does; it must, in short, be more than the sum of its parts. Whatever its merits, this familiar argument for the goodness of God's creation highlights the fact that moral reflection and artistic production have something important in common. To be skilled at either, a person must appreciate the reciprocal influence the elements of an action or an artwork have on one another and anticipate the effects of their combination; if he possesses this ability, we say, in either case, that he has imagination.

mistake, however, to conclude that imagination and objectivity are antithetical. In the domain of moral reasoning, these capacities are intimately connected. Both require a disengagement from the immediacy of desire; this common element links them to one another and to the notion of moral judgment as well.

The identification of objectivity with neutrality or impartiality is familiar enough, especially in the case of interpersonal conflicts. To resolve such conflicts in an objective fashion, one must adopt a point of view "above" the conflicting interests of the persons involved, the point of view of an arbiter who considers the interests of all parties from the same independent perspective. What is perhaps less obvious is that objectivity in interpersonal conflicts requires a detachment from the immediacy of one's own desires. A person striving to be objective must deny his desires the influence they ordinarily have (much in the way that a judge must put his own feelings and biases out of play when deciding a case). Disinterestedness and neutrality would be impossible if we could not disengage ourselves, for however brief a period, from our own desires. The power to do so must therefore be regarded as an indispensable condition of our capacity to attain even a small measure of objectivity in our relations with other persons.

The same is true in our intrapersonal moral deliberations. When I am considering a course of action of any real significance—one likely to have some bearing on the achievement of my most important goals or on the development of my character—it is essential that I disengage myself, so far as I am able, from the particular desires that motivate me and make the decision to take the action or avoid it in a considered, dispassionate way. I must attempt, in other words, to choose between this action and its alternatives in a neutral fashion and to resolve the intrapersonal dilemma they present in the same way (though not according to the same principles) that I resolve my differences with other persons when our interests conflict.

Imagination also requires disengagement from the immediacy of desire. Consider, first, the interpersonal use of imagination. An anthropologist or sociologist who wishes to understand the meaning of some previously unexplained practice—the ritual behavior, let us say, of a primitive tribe culturally remote from his own society—must make an effort to enter imaginatively into the tribe's own world and to see it from "within." This does not mean, of course, that he must actually embrace the tribe's values or view of the world (in the sense of approving or endorsing them). He must instead imaginatively construct a picture that connects the practice he wishes to explain with other aspects of the tribe's life, thereby locating this particular activity in a wider context of purposeful actions whose

meaning is already understood. To do this with any success, however, an anthropologist or sociologist must temporarily suspend his own cultural beliefs and deny them the efficacy or influence they normally have in his nonscientific life.⁹² To the extent he is unable to disengage or neutralize his own cultural commitments, his powers of imaginative construction are likely to be impoverished. Certain explanations of the tribe's behavior may not occur to him at all, including the explanation that most accurately reflects the tribe's own internal point of view. The more remote the subject matter of his inquiry from his own experience, the more the scientist needs an imagination whose free exercise requires the temporary suspension of personal commitments.

Imagination plays a similar role in our intrapersonal deliberations. When a person is considering whether to pursue an important course of action, he is likely to construct different imaginative pictures of it, each of which is a representation of its possible significance for him. The range of alternative interpretations a person is able to place on his own future conduct, his power of imaginative variation, is increased to the extent he is able to suspend the desires that presently motivate him to act. If a person cannot suspend his desires, even temporarily, they are likely to impede what Kant called the "free play of the imagination."⁹³ A powerful desire can stimulate the imagination, but may also constrain it. This is true in interpersonal relations, where our desires sometimes prevent us from understanding the experience of other persons by blocking our ability to enter their world imaginatively. Equally, when we reflect on ourselves, on who we are and what we wish to become, the pressing immediacy of our desires can paralyze our ability to anticipate, in imagination, the moral consequences of our own actions. In both cases, a free imagination is possible only if we have first given it the space it requires by distancing ourselves from our own desires.

It is this requirement that imagination and objectivity have in common. A person whose imagination is weak or undeveloped because he cannot extricate himself from the immediacy of his own desires will find it difficult to be impartial, and, to the extent his imagination is strengthened, an important condition of moral objectivity will also be secured. There is therefore nothing paradoxical about the claim that judgment (which we associate with impartiality and objectivity) represents a form of imagination. The exercise of judgment, whether in relations with others or in the elaboration and pursuit of personal ideals, requires a kind of disinterestedness, and the person who cannot suspend his own desires will never be

92. See A. KRONMAN, *MAX WEBER* 14-16 (1983); M. WEBER, *THE METHODOLOGY OF THE SOCIAL SCIENCES* 10-15 (1949).

93. I. KANT, *CRITIQUE OF JUDGMENT* § 9 (J. Bernard trans. 1951).

respected for his good judgment.⁹⁴

There is also an important connection between imagination and regret. A person is most likely to regret a past decision when he can no longer appreciate its rationality, when it seems to him to have been irrational and not merely mistaken. The weaker a person's imagination, the less likely he is even to consider the possibility that the desires motivating him to act may one day seem antithetical to his deepest interests, making it difficult for him to understand why he acted as he did and impossible to forgive himself for doing so; a person with a weak imagination is therefore especially susceptible to regret and its corrosive effects. This is another reason why the development of moral imagination, the faculty of judgment, is rightly included among the conditions of a free life and helps explain the fact that we associate poor judgment and a special susceptibility to regret with a lack of freedom, as we do in the case of children.

This suggests a general justification for those rules of contract law that protect against poor judgment by imposing a mandatory cooling-off period during which the parties to an agreement can withdraw after their initial enthusiasm has subsided. If judgment is a condition of freedom, restrictions of this sort arguably increase the parties' freedom by forcibly encouraging the development of their imaginative capacities; at the very least, they promote the welfare of the parties without significantly diminishing their freedom. This argument, however, is overbroad: The ways in which a person's judgment may be impaired are protean, but we quite properly refuse to recognize lack of judgment as a general defense against the claim that one has failed to meet his contractual obligations. What explains the law's selectivity in this regard and the particular pattern of restrictions it enforces?

The exceptional character of these restrictions reflects their anti-democratic nature. Our society is committed to the principle that, as long as they do not violate the rights of others, individuals may pursue their

94. The close connection between objectivity and imagination is reflected in the moral education we give our children. We often say to children, "Imagine how it would feel if . . .," and encourage them to consider their action from points of view other than their own. By stimulating their imagination in this way, we help them develop a habit of disinterestedness, which is an essential condition of objectivity in moral life. See J. RAWLS, *supra* note 61, at 468-69. To acquire such a habit, however, children must learn to put some distance between themselves and their desires. Initially, they are encouraged to do this in their relations with others and later, in their introspective relation to themselves. If a person cannot detach himself from his own desires, he will be unable to assess them critically, and one who lacks this quality of critical reflectiveness may also be said to lack self-control and even autonomy: Instead of being the master of his desires, allowing or denying their satisfaction in accordance with a rational plan, he will be mastered by them. To this extent, lack of moral imagination threatens freedom, and we train children to be imaginative so that they may eventually be free. To say that children lack judgment, that they have difficulty being objective, that their imagination is restricted, and that their decisions are not those of a fully free person, are different ways of describing the condition of a rational being enthralled by desire.

own conceptions of the good. We are also committed to the idea that the legal order should remain neutral among these conceptions, not favoring some or disfavoring others on the grounds of their intrinsic merit.⁹⁵ Whenever the law invalidates a class of agreements for reasons of this sort, it runs counter to the liberal ideal of a legal order that does not discriminate among conceptions of the good.⁹⁶ Although in certain cases such discrimination may be justifiable, our commitment to democratic values prompts us to demand a special defense for any proposed discriminatory rule. The burden of proof, in all cases of this kind, lies with those who would invalidate a particular class of agreements on the ground that they contribute to, or are part of, a way of life considered offensive or degrading.

Mandatory cooling-off periods, which only postpone the moment of contractual commitment, do not conflict as sharply with the principle of liberal neutrality as do those restrictions that flatly bar the enforcement of certain agreements because of their substance or content. But even the requirement of a cooling-off period has antidemocratic implications, which explains why we demand a special justification for these restrictions and would never think of imposing a cooling-off period in every contractual relationship. A certain degree of impetuous commitment may be part of a person's conception of what makes life valuable or at least interesting; to the extent the law prevents him from making such commitments, it obstructs his pursuit of a legitimate personal ideal. More importantly, the imposition of a mandatory cooling-off period implies a moral deficiency in those to whom it applies. While this need not be viewed as a direct challenge to the intrinsic merit of any particular conception of the good, the assertion of such a deficiency is *prima facie* inconsistent with the principle of equal respect for persons from which our commitment to liberal neutrality ultimately derives.

In the case of children, the imposition of a mandatory cooling-off period seems perfectly acceptable. Indeed, the special restrictions to which children are subject in their contractual dealings do not even strike us as anomalies. Anyone who claims that the principle of equal respect for persons requires that we defer to the choices of children as we do to those of adults has lost sight of an important fact: However great their eventual powers of autonomous self-control, persons have a natural history in which they undergo moral and psychological development along predict-

95. See Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 127-36 (S. Hampshire ed. 1978).

96. The nonrecognition of homosexual marriages is an example of what I have in mind. See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799, 874-78 (1979); Note, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 *U. PA. L. REV.* 193 (1979).

able lines and normally acquire the various capacities—including judgment or moral imagination—without which freedom in any meaningful sense is impossible. There is nothing remarkable in these observations, but they do reflect widespread agreement about certain basic facts of human character and development that tend to be obscured by the abstract conception of the person underlying our modern law of contracts and the various philosophical theories devised to explain it.

When both parties are competent adults, the imposition of a mandatory cooling-off period is, of course, more problematic. Consider, for example, the waiting period required in most states before a couple may begin or terminate a marriage.⁹⁷ Requirements of this sort have traditionally been justified on the grounds that a person who decides to marry or divorce without delay is likely to be moved by a powerful passion that can cloud his judgment and cause him to act in a way he will later regret.⁹⁸ The law protects such persons against their own temporary lack of judgment by requiring them to pause before they can proceed. Although poor judgment is certainly not limited to those entering or dissolving a marriage, two different considerations justify the unusual requirement of a cooling-off period in these circumstances. First, those contemplating marriage or divorce are especially likely to be influenced by strong and potentially distorting passions—by erotic attraction, anger, or jealousy. Like powerful passions of any sort, those that attend a marriage or divorce inhibit the imagination, making it more difficult for those involved to achieve a measure of neutrality. To be sure, similarly distorting passions may be at work even in the most mundane commercial transactions, but there is no way of distinguishing these cases from those in which the parties' judgment is unclouded without an intrusive and probably futile inquiry into their feelings and motives.

Second, although speed is essential in many contractual relationships, especially those of a commercial nature, this is less often and less obviously the case in the formation or dissolution of a marriage. A businessman may need an immediate and binding commitment from the person with whom he deals in order to plan for the future, but a similar urgency, created by competitive opportunities, rarely attends the decision to marry or divorce. If every contract were subject to a mandatory cooling-off period, the whole system of market exchange on which our modern economy rests would be impaired, but the requirement that a couple wait before they marry or divorce has less serious consequences.

These last remarks are tentative and leave much to be explained; they

97. See *supra* p. 788.

98. See Annot., 62 A.L.R.2d 1262 (1958).

do not, for example, explain why a cooling-off period is also required in various consumer transactions⁹⁹ or provide a basis for evaluating the wisdom of such requirements. My aim, however, has not been to justify every paternalistic rule intended to protect promisors against the consequences of their own poor judgment (many of these may, on reflection, prove unjustifiable) but to introduce, or rather reintroduce, the concept of judgment into our thinking about contract law.

Contract law is centrally concerned with voluntary exchange, and, although exchange is by no means limited to the market, our law of contracts tends to treat the impersonal market transaction as the paradigm of all exchange relationships.¹⁰⁰ The law of contracts does not encourage or even permit, except in extreme cases, an inquiry into the promisor's motives, emotions, and personal circumstances. When the promisor is treated in this way, as a disembodied ego or will without personal qualities,¹⁰¹ it is easy to forget that even the most impersonal market transaction occurs between human beings with a natural history, and to underestimate the importance, for freedom itself, of the capacities people normally acquire as they mature. The will-based theories of obligation that dominate the intellectual scene today obscure the complexity of our law of contracts by putting before us a wholly denatured conception of the person in which passion and moral imagination have no place. Whatever in our law of contracts is centrally concerned with these matters has, as a result, become mysterious and been brought under suspicion from a moral point of view. The rediscovery of judgment as a topic of interest and importance would be a step in the other direction.

Conclusion

Our legal system restricts contractual freedom in many ways and for many reasons. Some of these restrictions are paternalistic: Their purpose is to prevent people from harming themselves through their own ill-considered or disadvantageous promises. The paternalistic rules in our law of contracts do not derive, however, from a single principle, nor is there any one idea that best explains them all. In this Article, I have described three different forms of paternalism and have attempted to clarify the philo-

99. See *supra* note 12.

100. The impersonality of the market is reflected in many of the most basic features of contract law: the traditional unwillingness of courts to upset bargains for inadequacy of consideration, P. ATYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 448-51 (1979), the preference for money damages over specific performance, see Kronman, *supra* note 10, at 369-76, the noncompensability of emotional harms, 11 S. WILLISTON, *supra* note 8, § 1341, and the refusal to recognize financial hardship as a form of duress, *Hackley v. Headley*, 45 Mich. 569, 8 N.W. 511 (1881).

101. See C. FRIED, *supra* note 59, at 2, 68-69; O.W. HOLMES, *THE COMMON LAW* 300 (1881); R. POSNER, *supra* note 21, at 65-68.

sophical presuppositions that underlie each. I have argued that only the first, the nondisclaimable warranty, can be defended persuasively in economic terms. All three may be justified on moral grounds; in each case, however, the justification turns upon a different principle or ideal: distributive fairness, self-respect, and the value of judgment or moral imagination. The concept of paternalism conceals too much philosophical variety to be useful by itself; it wrongly suggests that all paternalistic restrictions address a single problem and must be justified by a single principle, or not at all.

Of course, the moral principles that underlie the three forms of paternalism distinguished in this Article are not entirely unconnected. I have emphasized, in particular, the close connection between moral imagination and regret; a complete theory of the person might further illuminate the link between them. It may also be possible to establish a connection between these ideas (which belong to the domain of philosophical psychology) and the concept of distributive justice by arguing, as Rawls does,¹⁰² that self-respect is a social good whose distribution is subject to the moral requirements applicable to all such goods. If these links can one day be established with as much conviction as philosophy permits, then perhaps we shall conclude that the concept of paternalism has an underlying unity after all. But it will be a different unity, and a deeper one, than any the concept now possesses.

102. J. RAWLS, *supra* note 61, at 440, 534.