Morality and Contract: The Question of Paternalism

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MORALITY AND CONTRACT: THE QUESTION OF PATERNALISM

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When we ask how morality relates to contract, we might have three questions in mind. One concerns the basis of contract law. Do its standard doctrines have anything to do with morality? A second is about paternalism. Is it right or proper for a state to interfere on moral grounds with contracts voluntarily entered into? A third concerns ethics. What moral standards, as distinguished from legal rules, should private parties respect when they make and enforce contracts? These questions are intertwined. I have written about the first of them elsewhere. I have discussed the third briefly in an essay on business ethics. Here, I will consider the second.

I. SOME BASIC CONCEPTS

As in dealing with the other two questions, I will be drawing on the ideas of writers in the Aristotelian philosophical tradition. Perhaps the most significant was the thirteenth century theologian and philosopher, Thomas Aquinas. Others lived during a neo-Thomist revival in the sixteenth and early seventeenth century and belonged to a school which historians call the “late scholastics.” Leading members were Domingo de Soto (1494-1560), Luis de Molina (1535-1600), and Leonard Lessius (1554-1623). Their
intellectual project was to synthesize Roman law with the ideas of Aristotle and Aquinas. Roman private law, as has often been said, treated particular problems with great subtlety but had no general theory. Roman public law was less subtle. It was based on the principle that all legitimate authority came, directly or indirectly, from the Emperor. As I have described elsewhere, the late scholastics gave Roman private law a theory and a systematic doctrinal structure for the first time. They also dismissed Roman claims about the Emperor's authority arguing, on Aristotelian grounds, that since man is a political animal, every society can establish its own government. Indeed, every society can reconstitute that government if its leaders subvert the ends for which government is established. In the seventeenth century, many of the conclusions of the late scholastics were borrowed and disseminated throughout Europe by the founders of the northern natural law school, Hugo Grotius (1583-1645) and Samuel Pufendorf (1632-1694), paradoxically, at the very time that the Aristotelian philosophical tradition was falling from favor.

I have tried to show elsewhere that ideas drawn from that tradition are more helpful than those of modern philosophers in understanding contract law. Here, I will begin by describing some key ideas that bear, as we shall see, on the question of when the state should interfere with voluntary private arrangements. Some people may regard these ideas as matters of common sense even though they have no commitments to Aristotelian philosophy and are not used to the Aristotelian vocabulary in which these ideas are expressed. Others may have serious objections. Such objections cannot be brushed aside or easily answered. For that very reason, they cannot be addressed here. The question here must be limited

6. Id. at 4.
9. Gordley, supra note 7, at 822.
10. Id.
11. See Gordley, supra note 5, at 71.
and hypothetical: supposing, as I have argued elsewhere, that these older ideas are helpful in understanding contract law, what are their implications for state interference with contracts? Even one skeptical of the value of the Aristotelian tradition might find that question interesting. He might even be less skeptical after seeing its implications. A person who was not skeptical would be still more interested in where these ideas lead.

For some modern thinkers, the choices a person makes matter because he will choose what he most prefers. The satisfaction of his preferences is deemed to be desirable, whatever they may be. Other modern thinkers believe that choices matter because they are an expression of individual freedom which no one has the right to override. In contrast, in the Aristotelian tradition, choices matter because of the contribution they make to a good life, a life that realizes, so far as possible, one’s potential as a human being. Leading such a life constitutes human happiness. It is the end which all actions should serve either instrumentally or as constituent parts of such a life.

Living such a life is the ultimate end of an individual. Enabling its citizens to live such a life is the end of government. In the Politics, Aristotle explained that “the form of government is best in which every man, whoever he is, can act best and live happily.”

Thus, for the individual and for the state, to choose rightly is to choose what contributes to such a life. The virtue of prudence is the ability to choose rightly. It is a rational ability. Animals cannot exercise prudence because they act by appetite. People, in contrast, can understand that an end is worthwhile and what actions contribute to it. Though prudence enables them to recognize the right choice, to act rightly they will need other virtues as well. For

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12. For a discussion of the ideas of these modern philosophers, see Gordley, Foundations, supra note 1, at 16-31.
13. See id.
14. See id.
16. Id.
18. See Aquinas, supra note 17, q. 47, art. 2.
example, they will need courage, which enables them to persevere despite fear, danger or pain, and temperance, which enables them not to be deflected by the pleasure that a wrong choice might bring.19 In the Ethics, Aristotle described the different virtues as acquired capacities to live this distinctively human life.20

Although prudence is a rational ability, nevertheless, it is not a form of deductive logic. One can understand many things that one cannot demonstrate. Consequently, to speak of “prudence” is merely to say that human beings do have an ability to understand what makes for a good life.21 It is not to explain how this ability works, or to claim that one can prove that certain choices are correct.

While prudence enables one to make correct choices, it does not follow that the same choices are right for everyone. People are different and so are their circumstances. Even if people were the same, there would still not be a single correct choice which every person under identical circumstances ought to make. Freedom of the will, according to Aquinas, means not merely that one may choose to act wrongly but that there may be different ways to choose rightly, no one of which is best.22 That is so even though the choice may matter very much. It matters which of many possible beautiful buildings an architect chooses to build even though one cannot rank order their beauty. For Aquinas, it mattered that God made the universe, but he discussed God’s freedom in the same way as that of human beings: there is no best of all possible worlds that God had to create.23 Thus, though there are wrong ways to live, there are many right ways to do so.

In deciding how best to enable their citizens to live a good life, those with political authority exercise prudence of a distinctive kind. Aquinas called it “political prudence.”24 Though prudence enables both individuals and their leaders to see what best contributes to such a life, neither individuals nor their leaders are infallible. Thus one question we will be confronting is what should

20. ARISTOTLE, supra note 17, bk. 5, ch. 7, at 1014-15.
21. Id. bk. 6, ch. 5, 1140a, at 1026.
22. AQUINAS I-II, supra note 17, q. 10, art. 2; id. I-II, q. 13, art. 6.
23. Id. I, q. 19, arts. 3, 10.
24. Id. II-II, q. 50, art. 2.
happen when the leaders believe that a certain choice is wrong. They may believe that a person making such a choice lacks prudence. Or they may believe he lacks courage, temperance, or some other virtue. Should they intervene? Here, we will be concerned with the extent to which they should do so by interfering with contracts the parties would otherwise enter into.

To live a good life, human beings need not only virtues but material things as well. In the Aristotelian tradition, enabling them to obtain what they need is the concern of three additional virtues: distributive justice, liberality, and commutative justice.\textsuperscript{25}

Those in authority exercise distributive justice when they allocate resources to ensure, insofar as possible, that each person can obtain what he needs.\textsuperscript{26} On a large scale, they may be deciding how all the resources of society should be divided. On a smaller scale, they may be deciding how to divide a limited stock of common resources: for example, how many fish each fisherman should be able to take from a public pond. Indeed, we can speak of distributive justice whenever a common stock of resources is to be divided even when the allocation is made by a private person: for example, by a dean assigning office space.\textsuperscript{27}

One can imagine two ways in which resources might be allocated. One is by deciding what each person needs to accomplish his ends and assigning him resources according to the value of his ends and the amount he needs to achieve them. Hugo Grotius pointed out that if this were the normal way of allocating resources, it would work only in a society like a family or a monastery where there are few people, and they are on good terms.\textsuperscript{28} There is another disadvantage as well. To the extent that those in authority are deciding how resources should be used, that choice will be made by them rather than by the individuals they govern. Yet, for Aristotle, making choices is part of living a good life.\textsuperscript{29} The distinctive feature of a human being is that he acts through reason, choosing on the

\textsuperscript{25} See id. II-II, q. 61, art. 1; ARISTOTLE, supra note 17, bk. 4, ch. 1, 1120a, at 984-85.
\textsuperscript{26} AQUINAS II-II, supra note 17, q. 61, art. 1.
\textsuperscript{27} Id.
\textsuperscript{28} HUGO GROTIUS, DE IURE BELLII AC PACIS LIBRI TRES II.ii.2 (1646).
\textsuperscript{29} See supra note 15 and accompanying text.
basis of what he understands.\textsuperscript{30} The state deprives him of this aspect of a good life when it makes decisions for him.

In any event, when writers in the Aristotelian tradition discuss distributive justice they did not generally have this method of allocation in mind. They commonly said that those in authority should ensure, so far as possible, that each person has a fair share of wealth. By wealth, they meant roughly what we would call purchasing power.\textsuperscript{31} A fair share, they acknowledged, will be understood differently in differently constituted societies. In a society ruled by the virtuous, an aristocracy, it will be taken to mean that wealth should be divided in proportion to virtue; in a democracy, that each person should ideally have the same share.\textsuperscript{32} Writers in this tradition made it clear, however, that such principles are ideals. Aristotle warned democracies not to confiscate the wealth of rich people, virtuous or otherwise, and divide it up.\textsuperscript{33} We can see one reason why they should not if we consider his objections, which Aquinas shared, to Plato’s proposal to abolish private property. Do so, Aristotle said, and there will be endless quarrels, and people will have no incentive to work or to take care of property.\textsuperscript{34} If these evils are to be prevented, an ideal distribution of wealth can only be approximated.

These conclusions became staples of the Aristotelian tradition. They were accepted by leading late scholastics such as Soto, Molina, and Lessius, and then borrowed by Grotius and Pufendorf. Although these writers developed these ideas in different ways, and although Grotius and Pufendorf borrowed from Aristotle less explicitly, they all said, like Aristotle and Aquinas, that by nature,
or originally, or in principle, all things belong to everyone. They all
describe private ownership as instituted to overcome the disadvan-
tages of common ownership, usually the ones that Aristotle and
Aquinas had mentioned.  

While the virtue of distributive justice is typically exercised by
those in authority, that of liberality is exercised by private persons
who choose to enrich others at their own expense. Peter Benson
has asked why, if resources have been distributed justly, liberality
should be a virtue at all. One reason is that, as writers in the
Aristotelian tradition recognized, an ideal distribution of resources
can only be approximated. In the first place, two individuals may
each receive a fair share of resources, but one may need more to
accomplish goals that are of greater value than those of the other.
Thus if each is to lead the best life, one will have more than he
should and the other less. That problem arises whenever the state
aims, not to allocate specific resources where they can best be
used, but to ensure each person a fair share. Second, as noted,
the accepted belief as to what constitutes a fair share will vary
according to how a society is constituted. If there is some truth to
both beliefs, there will be instances in which the distribution of
wealth is imperfect because it reflects only the belief that is
dominant. Third, as just observed, any ideal distribution to which
a society is committed can be realized only approximately if
incentives are to be given to work and to manage property. Some
people will end up with more than others, not because they need
more, but because they earn a lot from the work they do or from the
investments they make. The imperfections of distributive justice
are lessened when people who have more than they should, exercise

35. DOMENICUS DE SOTO, DE IUSTITIA ET IURE LIBRI DECEM lib. 4, q. 3, a. 1 (1553);
GROTIUS, supra note 28, at II.i.2; LEONARDUS LESSIUS, DE IUSTITIA ET IURE, CETERISQUE
VIRTUTIBUS CARDINALIS LIBRI QUATUOR lib. 2, cap. 5, dubs. 1-2 (1628); LUDOVICUS MOLINA,
DE IUSTITIA ET IURE TRACTATUS II, disp. 20 (1614); SAMUEL PUFENDORF, DE IURE NATURAE
ET GENTIUM LIBRI OCTO II.vi.5; IV.iv.4-7 (1688).
36. ARISTOTLE, supra note 17, bk. 4, ch. 1, at 984-88.
37. Peter Benson, Abstract Right and the Possibility of a Nondistributive Conception of
Contract: Hegel and Contemporary Contract Theory, 10 CARDOZO L. REV. 1077, 1195 n.168
(1989).
38. See supra note 32 and accompanying text.
39. GORDLEY, FOUNDATIONS, supra note 1, at 10.
the virtue of liberality by giving to those who have less.\footnote{ARISTOTLE, \textit{supra} note 17, bk. 1., ch. 5, 1120a-1121a, at 984-87.} As E. Allan Farnsworth notes, without using the terms "distributive justice" or "liberality," the enforcement of donative promises is "particularly desirable as a means of allowing decisions about the distribution of wealth to be made at an individual level."\footnote{E. ALLAN FARNSWORTH \& WILLIAM F. YOUNG, CASES AND MATERIALS ON CONTRACTS 98 (4th ed. 1988).}

Of course, the imperfections of distributive justice are corrected only to the extent that people give resources away wisely to those who genuinely have a greater need for them. As Aristotle said, liberality means giving "to the right people, the right amounts, and at the right time."\footnote{ARISTOTLE, \textit{supra} note 17, bk. 4, ch. 1, 1120b, at 985-86.} Elsewhere, I have argued that the reason the law is cautious in enforcing promises to give—for example, by requiring the promisor to complete a formality or to make delivery—is to ensure that the promisor does wish to commit himself and to encourage him to reflect on whether he is acting wisely.\footnote{GORDLEY, FOUNDATIONS, \textit{supra} note 1, at 352-58.}

In contrast to distributive justice and liberality, which attempt to provide people with resources they need, the aim of commutative justice is to preserve the share of resources that each person has.\footnote{ARISTOTLE, \textit{supra} note 17, bk. 5, ch. 5, 1132b-1133a, at 1010.} In contracts of exchange, each person obtains what he needs the most by giving something in return. According to Aristotle, commutative justice requires that he give an amount that is equivalent in value to what he receives so that neither gains at the other's expense.\footnote{\textit{Id.} bk. 5, ch. 3-4, 1131b-1132b, at 1007-10.} Modern jurists rarely speak of "commutative justice." Yet modern legal systems police contracts of exchange for fairness. Indeed, as I have argued elsewhere, they object to the same kinds of advantage taking that the writers in the Aristotelian tradition considered to be violations of commutative justice.\footnote{GORDLEY, FOUNDATIONS, \textit{supra} note 1, at 361-76.} Though these writers believed the resources the parties exchanged should be equal in value, they knew, of course, that each party receives something of greater value to himself than what he gives.\footnote{See ARISTOTLE, \textit{supra} note 17, bk. 5, 1133b, at 1011-12.} Otherwise he wouldn't exchange. As Aristotle said, a shoemaker
does not exchange with another shoemaker but with a house builder.\textsuperscript{48} They meant that the value of each party’s share of purchasing power should not change. Moreover, while they believed that this share should not change at the time the contract was made, they knew that it might change the next day. They recognized “that prices fluctuate, and must do so to reflect what they called the need, the scarcity and the cost of goods.”\textsuperscript{49} One need not be a modern economist to realize that if prices are fixed, and fail to reflect these factors, there will be an underproduction of goods or a queue of would-be buyers. Thus, although a change in price necessarily changes the purchasing power represented by each person’s goods, the change was one that writers in the Aristotelian tradition believed one must tolerate to avoid worse evils. Moreover, the goods a party purchased may deteriorate or perish. The late scholastics accepted the Roman rule res pereat domino: the loss falls on the owner.\textsuperscript{50} In their view, such a change in the distribution of wealth also had to be tolerated. But while one needed to tolerate these changes, one did not need to do so when a contract made one party richer and the other poorer at the very moment the contract was made. Thus they believed that the parties must exchange at a fair price, and they equated a fair price with the market price under competitive conditions at the place and time the parties contracted.\textsuperscript{51} That price reflected conditions of need, scarcity, and cost there and then.\textsuperscript{52} To take advantage of the other party’s ignorance or necessity to obtain more or less than the market price was, in their view, unfair.\textsuperscript{53} Similarly, although they knew that

\begin{footnotes}
\item[48] \textit{Id.}
\item[49] \textit{GORDLEY, FOUNDATIONS, supra note 1, at 10 (citing GORDLEY, PHILOSOPHICAL ORIGINS, supra note 5, at 94-102; MOLINA, supra note 35, at II, disp. 348); SOTO, supra note 35, at lib. 6, q. 2, a. 3. All of these factors had been mentioned, albeit cryptically, by Aquinas. \textit{See THOMAS AQUINAS, IN DEcem LIBros Ethicorum Expositio} lib. 5, lec. 9 (Angeli Pirotta, ed., Taurini, 1934); \textit{AQUINAS II-II, supra note 17, q. 77, arts. 3-4. They were discussed by medieval commentators on Aristotle. \textit{See ODD LANGHOLM, PRICE AND VALUE IN THE ARISTOTELIAN TRADITION} 61-143 (1979) (discussing the work of Albertus Magnus, Thomas Aquinas, Henricus de Primaria, and Johannes Baridanus).}
\item[50] \textit{GORDLEY, FOUNDATIONS, supra note 1, at 10.}
\item[51] \textit{Id. at 361.}
\item[52] \textit{Id. at 361-62.}
\item[53] \textit{E.g., AQUINAS II-II, supra note 17, q. 77, art. 1.}
\end{footnotes}
goods might be damaged or destroyed the next day, they thought that the seller should warrant his goods against any defects they possessed when sold. Alternatively, he could lower his price to compensate the buyer for the risk that the goods might be defective. Otherwise the seller would be providing defective goods while charging the price for sound ones.

Elsewhere, I have argued that modern legal systems police the same kinds of unfairness. In general, they give relief when the price is seriously unfair, and use, as a standard of fairness, the market price at the time and place of the transaction. They give relief when the auxiliary terms of a contract, such as disclaimers of warranties, place burdens or risks on a party that he is not compensated for bearing. Admittedly, the victim who receives relief was usually under some disability such as inexperience or hardship. But that is hardly surprising. Parties who are well able to protect themselves rarely become victims. Moreover, whatever a party’s disabilities, we would not consider him a victim deserving of relief unless we believed the contract he entered into treated him unfairly.

It is hard to see why we should care about these kinds of unfairness except for the reason given by the late scholastics. The distribution of resources, even if it is imperfectly just, is still worth defending. To the extent it is unjust, it should be corrected by a social decision, or by individual acts of liberality, but not by people who take advantage of the situation of others to redistribute wealth in their own favor. Therefore, in principle, neither party should be enriched at the other’s expense. That is so even if we sometimes must tolerate this evil to avoid a greater one.

54. See GORDLEY, FOUNDATIONS, supra note 1, at 10.
55. AQUINAS II-II, supra note 17, q. 77, art. 3.
56. MOLINA, supra note 35, at II, disp. 353.
57. GORDLEY, FOUNDATIONS, supra note 1, at 361-76.
58. Id. at 364-68.
59. Id. at 368-76.
60. Id. at 362-63.
61. See id. at 363.
II. PATERNALISM

A. What Counts as Paternalism

With these ideas in mind, we can turn to the question of paternalism. I will use that term for the want of a better one. I dislike that word because it seems to mean treating adults as though they were children. To do so is obviously wrong. Yet it may be symptomatic of our times that we have no other term for what the state does when it circumscribes or influences the choice a citizen would otherwise make because it believes the citizen's choice is wrong, whether through a want of prudence or of some other virtue. That is the sense in which I will be using the term paternalism here.

In this Section, we will see that, by this definition, some interferences by the state with the choices citizens would otherwise make are not paternalistic even though they are often considered to be. In the following sections, we will consider state actions that are paternalistic.

By the definition we have proposed, when the state intervenes to do distributive or commutative justice, it need not be acting paternalistically. It need not be questioning the value of any citizen's choice. In particular, when the state interferes so that the distribution of resources will be fair, or so that the terms of a contract will be fair, it is not behaving paternalistically. It is doing justice, either distributive or commutative justice.

If the state adopts a progressive income tax to secure a more equal distribution of wealth, it is not questioning how citizens spend their money. It is merely promoting the ideal of distributive justice which Aristotle thought characteristic of a democracy: the ideal of equality. It is the same as if fish were scarce in a public pond. The government could limit the number each fisherman may catch, not because it questions the value he places on fishing, but to ensure every fisherman gets a fair share.

The same can be said if the state intervenes to set wage rates. There are pragmatic reasons why it might not want to do so even if it believes that some people are underpaid. Wage rates have a dual function. On the one hand, the price of labor is like the price of any
other commodity. Absent government intervention, it is determined by supply and demand, or as the late scholastics would have said, by need, scarcity, and cost. Both modern economists and late scholastics agree that bad results can ensue if prices are set at a level that does not reflect these factors. The extent of these evils is currently a matter of debate among modern economists. Yet, as the popular press has recognized, there are two issues in the debate: the pragmatic one, which economists address, and the moral question of whether the government has any business telling employers how much they should pay. To do so, according to some, is paternalistic, presumably because the government is interfering with the terms of contracts voluntarily entered into. But whether setting wage rates is advisable, it is not paternalistic in the sense just described. The government is not saying an employer is acting imprudently or even that he is acting out of some vice such as greed. They are not even saying he should be more liberal. As in the case of progressive taxation, the goal of the government is greater equality among its citizens. That, according to Aristotle, is the democratic ideal as to how wealth should be distributed. Distributive justice, at least in the Aristotelian tradition, is certainly the business of government.

That is not to say the state never acts paternalistically when it concerns itself with distributive justice. It might limit what its richer citizens spend, not simply in the interests of equality, but because it also believes they are motivated by extravagance and greed. It might prohibit racial discrimination in housing and employment, not only to secure equality for people having difficulty finding decent housing or well-paid jobs, but also because it believes the preferences of the racial bigot are wrong. In these cases, it is preferring its own judgment of what is valuable to those of the extravagant, the greedy, and the bigoted.

62. See supra note 49 and accompanying text.
63. See GORDLEY, FOUNDATIONS, supra note 1, at 363.
65. See id.
66. See supra note 32 and accompanying text.
Moreover, the state would act paternalistically in doing distributive justice if it funds activities because it values them more than its citizens do. As we have already noted, normally the state does distributive justice, not by allocating resources to particular uses, but by attempting to give each citizen a fair share. Grotius pointed out that distributive justice by direct allocation could not work well except in small societies whose members are on good terms. But he was speaking of how resources are allocated generally. By way of exception, the state could allocate resources directly when it preferred its judgments of how they should be used to those its citizens would make. In doing so, it would be acting paternalistically.

Similarly, the state need not be acting paternalistically when it refuses to enforce a contract voluntarily entered into, at least on the terms to which the parties have agreed. It may merely be doing commutative justice. Take the case in which a person pays more or receives less than the market price. One could regard that price as unfair for the same reason as the late scholastics; it changes the distribution of purchasing power between the parties. The state might give relief simply because the price is unjust. In doing so, it is not questioning the judgment of the disadvantaged party as to what the other party's performance was worth. Whatever value that party personally places on that performance, he would not have paid more or accepted less than the market price except, as Lessius said, if he acted out of necessity or ignorance. In the case of necessity, he did not have access to the market. An example of necessity is the person in distress who must deal with only one possible rescuer. In the case of ignorance, he did not know the market price. In a well known American case, a court gave relief to a party who bought a refrigerator from a door-to-door salesman for three times its local retail price. It is possible, of course, that the disadvantaged party found himself acting out of necessity or

67. See supra notes 28-34 and accompanying text.
68. See supra note 28 and accompanying text.
69. See GORDLEY, FOUNDATIONS, supra note 1, at 366 (describing relief from a disproportionate price in Aristotelian terms).
70. LESSIUS, supra note 35, at lib. 2, cap. 21, dub. 4.
ignorance because of his own imprudence or some other vice. He may need to be rescued because he was imprudent or rash. He may not know the market price because he imprudently failed to investigate or lacked the willpower or courage to tell the door-to-door salesman to go away until he had had time to do so. But if he had access to the market or had known the market price, he would never have paid what he did. The state can conclude it is unjust to take advantage of his necessity or ignorance without ever questioning his own judgment of how he should spend his money or what performance is worth to him personally. In giving relief, the state is not acting paternalistically in the sense described earlier.

The same is most often true when the state gives relief because the terms of a contract are unfair. Economists say that if both parties had their eyes open, understanding the risks and burdens that a contract places on each of them, they would always put the risks and burdens on the party who could bear them the most easily. The parties would then adjust the price to compensate him for doing so. If one party would be willing to bear a risk or burden for $500, and the other for $50, the contract would never impose the risk or burden on the first party. The second party would have to compensate him $500 for agreeing to do so, in which case he would prefer to bear the risk himself and be compensated for bearing it. The late scholastics would have considered such a contract to be fair. Whatever may happen later if a risk materializes, at the moment the contract is made neither party is more likely to gain or lose any more than the parties to a fair bet. Conversely, if the contract places a risk or burden which one party would bear for $50 on a party who would only be willing to bear it for $500, the contract is unfair, like a bet on unfair terms. I have shown elsewhere that the cases in which modern courts typically give relief are like this. They are cases in which there are good reasons to believe that a contract placed a risk or burden on the party least able to bear it, and therefore to conclude that this party could not have been fairly compensated for doing so. In giving relief, a court is not behaving paternalistically in the sense described earlier. It is

72. GORDLEY, FOUNDATIONS, supra note 1, at 362.
73. Id.
not questioning how much a party would have been willing to pay to assume a risk or burden if he had understood its magnitude and significance. It is giving relief because he did not understand them and therefore was not fairly compensated. The court is doing commutative justice.\footnote{See id.}

That is not to say a court or legislature is never acting paternally when it is concerned about commutative justice. In the example just given, $500 and $50 were the amounts the parties themselves would have accepted for bearing a risk or burden if they had understood its magnitude and significance. For example, the party might have agreed to a waiver of warranty for defects because he did not understand the significance of the waiver, the likelihood the product would be defective, or the consequences if it were. But it is also possible for a court or legislature to believe that a party was too willing to bear a risk or burden. He was not compensated adequately for assuming these risks and burdens, not because he failed to understand them, but because he was imprudent or rash in placing a value on them. Workers who have to walk across unfenced catwalks over boiling vats of meat, as in Upton Sinclair’s book The Jungle,\footnote{UPTON SINCLAIR, THE JUNGLE: AN AUTHORITATIVE TEXT, CONTEXTS AND BACKGROUNDS, CRITICISM (Clare Virginia Eby ed., Norton 2003) (1906).} might fully understand the risks. They might be willing to accept them for a small increase in pay which corresponds to the amount it would cost their employer to fence the catwalks. But the state may enact safety legislation because it believes the workers made the wrong choice, and therefore were inadequately compensated for risking their lives.

Nevertheless, the state need not be acting paternally when it tries to allocate resources fairly or when it polices the fairness of contracts. The moral principles on which it acts are those of distributive and commutative justice.\footnote{See AQUINAS II-II, supra note 17, q. 61, art. 1.} These principles require the state to do what it can to see that each citizen can acquire a fair share of purchasing power. Each citizen, as long as he acts fairly, is then free to acquire purchasing power by selling his labor or investing his capital as he sees fit, and to obtain what he needs by contracting for goods and services as he sees fit. That is the way the
principles of distributive and commutative justice normally operate. In this Essay, our concern is when the state should trump their normal operation because it fears its citizens will make bad choices; for example, by taking the wrong jobs, or agreeing to work under the wrong conditions, or spending money in the wrong ways. In these situations, the state has a paternalistic objection to the contracts into which its citizens want to enter. Thus, although the subject of this Essay is paternalism and contract, it will not say much about the normal rules of contract law, or even about doctrines, such as unconscionability, that give relief when a contract is unfair. It will discuss when these paternalistic objections warrant interference with the contract that citizens would otherwise make.

B. Paternalism in the Aristotelian Tradition

We will ask, from an Aristotelian perspective, to what extent a state should interfere with or influence people's choices, and, more particularly, to what extent it should do so because it disagrees with its citizens' choices as to what contracts to make. According to Aristotle, the goal of government is that "every man, whoever he is, can act best and live happily." How well and happily he lives depends on the choices he makes. Why, then, shouldn't the state sit in judgment of all of his choices? Aristotle thought that in principle the law commands every act of virtue. Why, then, doesn't the law prescribe every choice? Yet neither Aristotle nor those who wrote in the Aristotelian tradition thought that it should.

This question arises if one takes the position, in the words of John Finnis, that "the state's common good is the fulfilment (and thus the complete virtue) of each of its citizens, and that government and law should therefore promote that fulfilment." In that event, the attempt to do so "is not ultra vires—does not reach beyond the state's common good or the purpose, functions, and

77. ARISTOTLE, supra note 15, bk. 7, ch. 2, 1324a, at 1279.
78. AQUINAS II-II, supra note 17, q. 58, art. 6; see ARISTOTLE, supra note 17, bk. 5, ch. 1, at 1002-04.
jurisdiction of state government and law," although, of course, some such attempts may be unwise. It would seem that anyone writing in the Aristotelian tradition must take that position. Yet Finnis believes Aquinas did not, although he thinks that Aristotle may have done so. According to Finnis, Aquinas thought that the state would be acting *ultra vires* if it tried to promote its citizens' fulfilment in this sense. To do so would, for some reason, be beyond the state's proper functions. If Aquinas held this view, and was correct to do so, then the state simply should not act paternally in the sense we have described.

Finnis's claim is based on a close analysis of Aquinas's texts. Nevertheless, I do not think Aquinas held such a view, nor that Aquinas could do so without breaking with Aristotelian principles that he accepted.

The passages Finnis finds to be "clearest" are those in which Aquinas contrasts divine law and human law. "God's law does not require merely that one behave well in accordance with other people as the laws of just kings do." "Kings are constituted to preserve interpersonal social life...." "Human law's purpose is the temporal tranquility of the state, a purpose which the law attains by coercively prohibiting external acts to the extent that those are evils which can disturb the state's peaceful condition." "Human law does not make prescriptions about all the acts of all the virtues but only about those that are relatable to the common good."
forward precepts about anything other than acts of justice and injustice; if it prescribes the acts of other virtues this is only because they take on the character of justice [assumunt rationem iustitiae].

Finnis concludes that in Aquinas's view, "those vices of disposition and conduct which have no significant relationship, direct or indirect, to justice and peace are not the concern of state government or law. The position is not readily distinguishable from the 'grand simple principle'... of John Stuart Mill's On Liberty." Finnis concludes that in Aquinas's view, "those vices of disposition and conduct which have no significant relationship, direct or indirect, to justice and peace are not the concern of state government or law. The position is not readily distinguishable from the 'grand simple principle'... of John Stuart Mill's On Liberty."

I believe that Finnis has read a great deal too much of Mill into Aquinas. In fact, it would be surprising if he had not. Ever since Mill wrote, a perennial topic of public debate has been the extent to which the state can enact legislation governing personal morality. And yet Aquinas’s writings did not spark debate over whether the state could regulate dram shops and brothels, pass sumptuary laws, and instruct the night watch to curb immoral behavior.

As Finnis notes, in the texts that best support his argument, Aquinas is distinguishing between divine and human law. Nevertheless, when Aquinas discusses why there must be divine as well as human law, none of his reasons suggests that human law goes beyond its proper functions when it attempts to make men virtuous. Divine law is needed, according to Aquinas, because man has a supernatural end that requires more than natural knowledge; because human lawmakers can be mistaken even about matters within the realm of natural knowledge; because “man is not competent to judge of interior movements, that are hidden, but only of the exterior acts that appear” and so “human law could not sufficiently curb and direct interior acts” which are also necessary for the perfection of virtue; and because, if human law forbade all evils, it might do more harm than good.

88. AQUINAS I-II, supra note 17, q. 100, art. 2.
89. FINNIS, supra note 79, at 228 (footnote omitted). Similarly, Finnis claims that according to classical political thinkers like Aquinas, “[t]he proper function of the state’s law and government... is not... to make people integrally good but only to maintain peace and justice in interpersonal relationships.” John Finnis, Abortion, Natural Law, and Public Reason, in NATURAL LAW AND PUBLIC REASON 75, 77 (Robert P. George & Christopher Wolfe eds., 2000).
90. FINNIS, supra note 79, at 223.
91. AQUINAS I-II, supra note 17, q. 91, art. 4.
All four reasons are concerned, not with whether human law should promote virtue, but with the difficulties of doing so given human ignorance and the risk of causing unwanted harm. Indeed, the reason human law is concerned with external acts, according to Aquinas, is not that they are dangerous to public order, as Finnis conceives it, but that people cannot read minds. One cannot tell if another person lusts after a woman in his heart unless he does something outwardly. Even the canon lawyers who were in charge of interpreting and enforcing divine law recognized that there were certain offenses a church court could not deal with because the judges, being human, could only judge by outward acts. For example, according to some canon lawyers (and Aquinas\textsuperscript{92}) a man would sin if he had sexual relations with his own wife but did not care whether he was with her or any other woman.\textsuperscript{93} According to one papal decree, a man would commit usury if he sold goods for future delivery but padded the price so that he was in effect charging interest.\textsuperscript{94} But only the man himself could know his own intent. Consequently, such offenses were dealt with, not in the "external forum" of the church courts, but in the "internal forum" of the confessional in which the penitent acknowledged his sinful intentions. It is not surprising that Aquinas thought that courts applying human law had to judge by external acts.

As Finnis notes,\textsuperscript{95} Aquinas did say that human law is concerned only with justice and injustice and not with the other virtues as such; it is concerned with what affects other people; its business is to promote tranquility, peace, and, more generally, the "common good." But Aquinas, following Aristotle, distinguished two kinds of justice: "general" and "particular."\textsuperscript{96} "Particular justice" includes both distributive and commutative justice; if particular justice is violated, one person has received or taken or harmed what rightfully belongs to another.\textsuperscript{97} As we have

\textsuperscript{92. THOMAS AQUINAS, SCRIPTUM SUPER LIBROS MAGISTRI SENTENTIARUM 4.21.2.3 (1868).}
\textsuperscript{93. For citations, see James Gordley, Ardor querens Intellectum: Sex within Marriage according to the Canon Lawyers and Theologians of the 12th and 13th Centuries, in 83 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE, KANONISCHE ABTEILUNG 305, 328 n.114 (1997).}
\textsuperscript{94. DECRETALES GREGORII IX 5.19.6.}
\textsuperscript{95. FINNIS, supra note 79, at 224.}
\textsuperscript{96. AQUINAS II-II, supra note 17, q. 61, art. 1.}
\textsuperscript{97. Id.}
seen, when the state acts to promote distributive or commutative justice, it does not act paternalistically as we are using the term.\textsuperscript{98} If Aquinas had thought human law should be concerned only with particular justice, Finnis would be correct: Aquinas would have thought it ultra vires for the state to promote its citizens' fulfilment except by promoting particular justice. But if that is what Aquinas meant, he could have said so.

Aquinas explains "general justice" (which he also calls "legal justice") in this way:

Now it is evident that all who are included in a community stand in relation to that community as parts to a whole and that a part, as such, belongs to a whole, so that whatever is the good of a part can be directed to the good of the whole. It follows therefore that the good of any virtue, whether such virtue directs man in relation to himself, or in relation to certain other individual persons, is referable to the common good, to which justice directs: so that all acts of virtue can pertain to justice, in so far as it directs man to the common good. It is in this sense that justice is called a general virtue. And since it belongs to the law to direct to the common good, as stated above ... it follows that the justice which is in this way styled general, is called 'legal justice,' because thereby man is in harmony with the law which directs the acts of all the virtues to the common good.\textsuperscript{99}

Here, Aquinas explains, because the relationship of a citizen to the community is that of a part to the whole, his own perfection—whatever is good for him, including virtues that "direct man in relation to himself"—can be directed to the perfection of the whole, that is, to the "common good to which justice directs."\textsuperscript{100} If someone becomes a better person, the community to which he belongs is better for that very reason. If a person becomes worse, the community of which he is a part is also worse. Nor is it an objection, Aquinas says, that "justice is always toward another" person.\textsuperscript{101} The reason is that when one is part of a community, "things referable to oneself are referable to another, especially in

\textsuperscript{98} See supra Part II.A.
\textsuperscript{99} AQUINAS II-II, supra note 17, q. 58, art. 5 (footnote omitted).
\textsuperscript{100} Id.
\textsuperscript{101} Id.
regard to the common good.”

That is a sensible way to think of a community in which each member is concerned with the welfare of the others. A child who becomes a moral degenerate hurts his family. His parents and siblings are worse off whether he robs or hurts them, or fails to meet his other family obligations.

Does it follow, then, that general justice is the same as all virtue? Not in one sense. It is different from the others in as much as each virtue has its own proper object. Yet the proper object of general justice is the common good. Thus, “the name of legal justice can be given to every virtue, in so far as every virtue is directed to the common good by legal justice.... Speaking in this way, legal justice is essentially the same as all virtue, but differs logically.”

Consequently, when Aquinas asks whether an effect of law is to make man good, he answers yes: “the proper effect of law is to lead its subjects to their proper virtue; and since virtue is that which makes its subject good, it follows that the proper effect of law is to make those to whom it is given good ....” Aquinas is speaking of law generally. He does not make an exception for human law. When he asks “whether it was useful for laws to be framed by men,” he answers that they are because “man has a natural aptitude for virtue, but the perfection of virtue must be acquired by means of some training.”

Human laws can help provide that education. When he asks “whether it belongs to human law to suppress all vices,” he does not answer that to do so would be ultra vires or that human law is only concerned with particular justice. He answers that it would be impossible to do so since nonvirtuous men are incapable of avoiding all vices.

Human law should concentrate on the most grievous vices “and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained.” His reason for concentrating “chiefly” on the latter is the importance of maintaining human society, not that it would be ultra vires to prohibit other vices as well. The more grievous

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102. Id.
103. Id. q. 58, art. 6.
104. Id. I-II, q. 92, art. 1.
105. Id. q. 95, art. 1.
106. Id. q. 96, art. 2.
107. See id.
108. Id. q. 96, art. 2.
ought to be prohibited. The less grievous should be tolerated because "[t]he purpose of human law is to lead men to virtue, not suddenly, but gradually."\(^\text{109}\)

Finnis is, of course, aware that passages such as these seem to undercut his position. He notes that there are "many texts, in many parts of Aquinas' work, which flatly say that law and state have amongst their essential purposes and characteristics the inculcation of virtue."\(^\text{110}\) Finnis answers that, nevertheless, "it simply does not follow that lawmakers and other participants in state government are responsible for directing and commanding all the choices that need be made if this all-inclusive good is to be attained."\(^\text{111}\) Aquinas says that some matters, such as whom to marry, cannot be commanded by the highest human authority.\(^\text{112}\) Here, Finnis is surely right albeit for the wrong reason. As we have seen, Aquinas did not believe that the proper function of the state was simply to do distributive and commutative justice, and that any further interference with its citizens was *ultra vires*.\(^\text{113}\) He could not have done so without breaking with the Aristotelian tradition in which the goal of government is that "every man, whoever he is, can act best and live happily."\(^\text{114}\) Finnis's reading of Aquinas may reflect his own fear that by any other interpretation, the state could direct and command all choices. But we will now see other reasons why it should not.

\textbf{C. A Critique of Paternalism}

We will first describe three ways in which the state might act paternalistically. We will then perform a thought experiment. We will imagine a hypothetical aristocracy ruled by the virtuous—those who really are better able than others to make correct choices. We will ask when paternalism would be justified in this imaginary state. We will then consider when it would be justified in the democratic society in which we actually live. Our main conclusion

\begin{footnotes}
\item[109] Id.
\item[110] FINNIS, supra note 79, at 232 (footnote omitted).
\item[111] Id. at 235-36.
\item[112] Id. at 240 & n.96.
\item[113] See supra notes 77-102 and accompanying text.
\item[114] ARISTOTLE, supra note 15, bk. 7, ch. 2, 1324a, at 1279.
\end{footnotes}
may seem surprising: there is not much difference in when a
democratic society should interfere with the choices of its citizens
as compared with this hypothetical aristocracy. Only, it should be
more hesitant to do so, and it should intervene in somewhat
different ways.

1. Types of Paternalism

Suppose the state believed that without its intervention, people
would make the wrong choices. It might try to limit or influence
their choices in three ways.

First, it could prohibit them from making certain choices or
require them to make others. For example, the state may prohibit
prostitution or drug use. It may prohibit racial discrimination in
hiring and in the sale or rental of housing. It may require that
medicines, factories, and means of public and private transportation
meet certain safety requirements. It may require people to save
money for their old age.

Second, the state may condemn or endorse certain choices
without legally prohibiting or requiring them. For example, it may
discourage people from buying cigarettes or encourage them to
seek additional education, although it neither outlaws the sale of
cigarettes nor requires enrollment in a vocational school or college.
In such cases, the state is exercising its authority although it is not
making laws. It expects its citizens to make better choices because
they respect the state's judgment. If the state is an authority to
which its citizens will defer, it can expect its judgments to carry a
different weight than those of private persons.

Third, the state can allocate resources so as to encourage or
enable certain choices to be made. It can fund schools, endow a
national science foundation, subsidize the arts, build parks, or
provide tax benefits for the purchase of pollution control devices or
electric cars. In doing so, it is pursuing the ultimate purpose of
distributive justice, which is to allocate resources so they can
contribute to a good life. But as we have seen, the state is then
doing distributive justice by directly allocating resources for
purposes that it values. It is not simply trying to secure a fair

\[115. \text{See supra notes 26-27 and accompanying text.}\]
share of resources for each citizen to use as he sees fit. As long as it does so by way of exception, it can avoid the difficulties Grotius pointed to if all resources were allocated directly to whomever the state thought could use them best.\textsuperscript{116} Still, as noted earlier, when the state does so because it believes its own choices are better than those its citizens might make, it is acting paternalistically in the way it does distributive justice.\textsuperscript{117}

We will ask, from an Aristotelian perspective, to what extent a state should interfere with or influence people's choices in any of these ways, and more particularly, to what extent it should do so because it disagrees with its citizens' choices as to what contracts to make.

2. A Thought Experiment: The Rule of the Virtuous

Let us first imagine that we live in a society in which those in authority have a greater capacity to make good choices than citizens do in general, and that this society is so structured that those in authority are under no constitutional constraints, formal or otherwise, in prescribing how their citizens should live. This hypothetical society is, in Aristotle's terms, an aristocracy, by which he meant rule by the virtuous. In contrast, rule by the well born or the rich, in his terminology, is not an aristocracy but an oligarchy. A "hereditary aristocracy" would be a contradiction in terms.

Supposing, then, that the virtuous rule, and are entitled to make decisions for others on the ground that their decisions are more likely to be right. Why would they not prescribe or at least try to influence every choice their citizens should make? We will first consider why they should not do so in the first of the three ways just discussed: by mandating some choices and prohibiting others.

To begin with, even though in our imaginary society the virtuous are better at making choices, sometimes they would not conclude that they knew better what choice others should make. One reason is that, as we have seen, sometimes there is no right answer as to how people should act.\textsuperscript{118} Wise rulers would not intervene because

\textsuperscript{116} GROTIUS, supra note 28.
\textsuperscript{117} See supra Part II.A (discussing paternalism and giving examples of when a state is, and is not, acting paternalistically in doing distributive justice).
\textsuperscript{118} See supra notes 22-23 and accompanying text.
they could not say their citizens were acting wrongly. There may be no “right answer” as to whom a person should marry or what career he or she should pursue, even though these choices matter a great deal.

Another reason is that, even if there were a right answer, the answer might depend on who a person is and what his circumstances are. Depending on who Jill is and on her circumstances, it might be right for her to marry Tom but not Bill, or to be a litigator rather than a physical therapist. Even if those in authority have a greater capacity to choose rightly, they may think that Jill is better able to make the right choice because she knows herself and her circumstances better than they do. Our hypothetical wise rulers would not interfere with her choice because they know she is more likely to be right.

This consideration seems intuitively correct whether or not we live in a hypothetical society ruled by the virtuous and whether or not one subscribes to the Aristotelian tradition. Modern governments proscribe those contracts which they deem to be bad for everyone, such as payments for sex or the sale of addictive drugs. Rarely if ever does a government scrutinize contractual arrangements that it acknowledges could be right for one person and wrong for another according to the circumstances. It does not tell its citizens whom to marry. It generally does not tell them what career to pursue or what to buy. When it does—for example, by prohibiting the career of a bare-knuckle pugilist or the purchase of sex or addictive drugs—it does so on account of a belief that the wrongness of these choices does not depend upon the circumstances.

In the cases we have just discussed, those in authority would not intervene because they would not think their own choices were better than those of their citizens. Let us now consider cases in which they would believe their choices to be superior. Even then, they should not override the choices of others whenever their own are likely to be better.

One reason is that, in the Aristotelian tradition, a person who lives a truly human life not only acts as he should, but chooses to do so because he understands, through the exercise of prudence, that his act contributes to a good life. The defining characteristic of a

119. See supra notes 15-21 and accompanying text.
human being is that he chooses on the basis of what he understands. If all of his choices were made for him, even if they were better choices, he would not be living a more genuinely human life; he would not be living a human life at all.120

Choosing for oneself contributes more in some areas of life than others. One's life would be seriously impoverished if one lost control over basic decisions about marriage, child rearing, work, helping others, and developing one's own moral, spiritual, and intellectual life. Control over these decisions is important, not simply because freedom is important, but because, from an Aristotelian perspective, some kinds of freedom contribute more to a good life than others. In such cases, the state should be especially reluctant to intervene.121 It should feel less reluctant when the decision is, for example, whether to take Valium without a doctor's prescription or whether to save for one's retirement.

Indeed, if the state were to intervene in the areas just described, where the power to make one's own choices contributes the most to living a truly human life, its best justification would be, not that a person may choose wrongly, but that he has chosen an arrangement, however freely, that unduly restricts the choices that he should make for himself. The clearest example would be selling oneself into slavery. But even a marital arrangement would be bad if it reduced one spouse to a condition of near slavery. An educational system would be bad if, in effect, it took over the task of parenting rather than merely helping children to learn. A job would be bad if it deprived a person of the time needed to be a good spouse, to be a good parent, and to develop himself morally, spiritually, and intellectually in ways not possible in the workplace. Indeed, as James Murphy has emphasized, a job is bad when the work itself degrades rather than develops a person's capacities for self-development.122 Thus the state might intervene so that individuals would have more control over choices they should make for themselves. How the state might do so is a different and complicated question.

120. See supra notes 12-21 and accompanying text.
121. See, e.g., note 112 and accompanying text.
Moreover, a person may benefit from his wrong choices by learning to make better ones. In the Aristotelian tradition, a virtue is an acquired capacity to perform actions that contribute to a good life, as distinguished from capacities such as sight or hearing which also contribute but which are not acquired over time and through practice. Prudence is no exception. One is not born prudent. One becomes prudent by continually making judgments and so acquiring the ability to make better ones. However prudent a person may be, he was once less prudent and made choices that were less consistently correct. If someone else were to make these choices for him, even if the choices were better, he would not acquire the virtue of prudence.

Thus a state should be more reluctant to intervene when allowing a person to make wrong choices is likely to improve his capacity to make better ones. It should be less reluctant when allowing him to do so does not improve this capacity. For example, one is not likely to improve one's capacity to take the least dangerous medicines or fly the most safely designed aircraft by making choices and then seeing what happens. The capacity to make these choices well depends on a knowledge of medicine or aviation—a knowledge few people have, and which is acquired by study, not by trial and error. That is why, even in modern states which are not presumed to be run by the virtuous, few people object to state scrutiny of the safety of drugs or aircraft designs.

We have seen two reasons, then, why even a state ruled by the virtuous would allow people to make decisions which it believes to be wrong. The ability to choose for oneself contributes to a truly human life, and contributes more in some areas of life than in others. Moreover, sometimes, but not always, making wrong choices teaches one to make better choices.

Nevertheless, some choices can be so seriously wrong that they should be overridden. That is likely to be so, for example, if the very objective pursued by the choice maker is one which detracts from a good life. Take the case mentioned earlier where a bigot discriminates in hiring or providing housing to someone of a different race simply out of hatred. As mentioned, the state might be particularly willing to override this choice, not only to provide an

123. See supra p. 1744.
equal opportunity for members of the group the bigot hates, but because a person's ability to choose whether to indulge in racial hatred cannot benefit him. That would be a sufficient reason for requiring him not to discriminate even if the group he hates happens to be able to find good jobs and housing elsewhere.

Moreover, the state should be more willing to override a choice that imperils the ability of the choice maker to make any future choices. An example is the case mentioned of workers who agree, for a small increase in pay, to walk over vats of boiling meat on unfenced catwalks. That is another reason why, even in modern states that no one assumes to be ruled by the virtuous, few object to safety regulation.

There is a final reason why, even in a state ruled by the virtuous, those in authority would not prohibit a choice they knew to be wrong or require one they knew to be right. As Aquinas observed, the law cannot literally command all acts of virtue because not all people are virtuous. Virtue is an acquired ability to do what is right. Prudence enables a person to see what is right. But to do what is right a person needs other virtues as well, such as fortitude, which enables him to persevere despite fear, difficulty, and pain, and temperance, which enables him to do so despite the pleasure that wrong choices often bring. Through effort, people can acquire these virtues. But if they do not have them, they cannot be made to act as if they did, even if the law commands them to do so. That is so even if they themselves believe that their lives would be better if they behaved in the virtuous manner that the law commands.

Suppose a person does not value literature or music because he has imprudently devoted all his time to making money, not for the good he can do with it, but for its own sake. To force him to acquire books or concert tickets would be pointless. Similarly, it would be pointless and perhaps harmful to prohibit the sale of alcohol if people are going to drink anyway. That is why most people consider its prohibition in the United States to have been a mistake, even if one grants the premise that the consumption of alcohol does more harm than good. There are similar reasons for refusing to
prohibit the sale of cigarettes. Even in times when standards of sexual morality were more strict than they are today, it was recognized that much had to be tolerated that some thought ought to be condemned. Premarital intercourse was morally condemned and some governments enacted anti-cohabitation laws; yet, as one character observed in Shakespeare's *Measure for Measure*, to prevent misconduct of that sort one would have to "geld and spay all the youth of the city."128 Prostitution was morally condemned but many governments licensed brothels, even, at one time, the Papal States. Medieval canonists, when asked how a Christian emperor such as Justinian could have permitted divorce, answered that he might legitimately have thought that the consequences of prohibiting it would be worse.

As described earlier, prohibiting certain actions and requiring others is only one way a state might proceed when it acts paternally in the sense of setting its own judgments of right conduct ahead of the judgments of those it governs. A second way would be to endorse or condemn certain actions without criminalizing or mandating them. A third would be to allocate resources so as to encourage or enable certain choices to be made.129

In the hypothetical society we are imagining, which is ruled by the virtuous, rulers would rely heavily on this second way of influencing choices. It avoids many of the problems seen with the first. To legally prohibit or require an action, one needs to be specific about the action. When one is commending right actions and condemning wrong ones, one need not be so specific and can merely describe the ideals or principles that should guide a person when he acts. People can remain free to apply these principles differently according to who they are and the circumstances in which they find themselves. Even when the admonitions are specific, as long as they do not have the force of law, people remain free to make their own choices. If they disregard these admonitions they may choose wrongly, but as we have seen, it is sometimes good to allow people to choose wrongly, both because choosing for oneself is part of living a good life and because by choosing for oneself one

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128. WILLIAM SHAKESPEARE, MEASURE FOR MEASURE, act 2, sc. 2.
129. See supra Part II.C.1.
can learn to make better choices.\textsuperscript{130} Moreover, because the state is admonishing without criminalizing, it does not face the problem of making laws it cannot enforce.

The disadvantage, of course, is that an admonition without the force of law leaves each person legally free to choose wrongly. Nevertheless, such admonitions would have a stronger influence in the society we are imagining in which the virtuous rule. By hypothesis, their warrant to rule is their claim to a greater understanding of how choices should be made. If that claim were not accepted, they would lose legitimacy and perhaps power. As long as it is, their judgments will carry a moral authority that they otherwise could not. Indeed, governments that have approximated our hypothetical aristocracy have relied heavily on admonitions and have sometimes considered them preferable to outright coercion.

Admittedly, while there are many historical examples of democracies, of oligarchies based on heredity or wealth, of tyrannies, and of ideologically-committed totalitarian regimes, there are few of aristocracies in the sense just described: governments in which power is held by a group of people whose qualification to rule is that its members are deemed to have a superior capacity for moral judgment. Three examples that come readily to mind are the authority of scholars in Confucian China; that of priests, bishops and theologians in the Roman Catholic Church; and that of rabbis in traditional Jewish communities. Members of these groups went through a special education which was supposed to train them, not in a technical skill, but in the making of moral choices. Their lives were supposed to exemplify the virtues they had been taught—although, as an historical matter, their failings were many. Their position and influence largely depended on selection and promotion by other members of the group and on their reputation for exemplifying the group’s values. It is not an accident that members of all these groups either deprecated the use of power to enforce their decisions or lacked it. In practice, Chinese emperors used force continually, but Confucian scholars said it should be a last resort; virtue should be inculcated in the people by example. The Catholic Church did not have or claim the coercive power of secular governments, although it was willing to make use of their powers when it

\textsuperscript{130} See supra notes 12-21 and accompanying text.
felt threatened, for example, by heresy. In principle, the Church could only impose "spiritual sanctions" such as excommunication or interdict which were effective only to the extent people were willing to respect them. Rabbis typically had no powers of physical coercion.

The reason the members of these groups relied less on the use of force must have been twofold. First, those whose authority rests on moral respect have less need of force. Second, people are more likely to believe that they should be obeyed because they are entitled to respect, not because they legitimately hold the power to coerce obedience. Thus, in the hypothetical society we are considering, more could be done by exhortation and admonition.

The third way to influence the choices of others would be to allocate resources so that certain choices would be more feasible or likely to be made. Making this allocation, as we have noted, is a matter of distributive justice.131 According to Aristotle and Aquinas, the principle governing distributive justice would be different in an aristocracy than in a democracy.132 In an aristocracy, in principle, the virtuous should receive more. In a democracy, in principle, free citizens should receive the same amount. As mentioned, one problem facing either form of government is that these principles can only be ideals.133 They must be compromised if incentives are to be provided for people to labor and to take care of property. Thus the question, in either form of government, is how far to compromise the ideal for these pragmatic reasons. Cling too closely to the ideal and the society is impoverished. Compromise it excessively and too much wealth ends up in the wrong hands.

An aristocracy, however, will operate on the assumption the virtuous will know best how wealth should be used, whether on charitable assistance to others, on the owner's moral, spiritual and intellectual cultivation, or on projects of value to the community. The question will be to what extent these choices should be made by the virtuous acting collectively or as individuals. Those who rule could fund and administer state projects to help the poor, or to endow academies, or to settle disputes through central courts. Or

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131. See supra Part II.C.1.
132. See supra note 32 and accompanying text.
133. See supra note 32 and accompanying text.
they could leave these matters, to local authority and private resources of members of the elite. Either way, the choices would be made by the virtuous, whom, we are imagining, are the holders of power.

3. Paternalism in a Democratic Society

The reason for considering what the virtuous rulers of this imaginary state might do is not because it might be advisable to replace our democracy with such a government. That would be a foolish idea. There is no distinct group in our society that could make a claim to superior virtue which the members of our society would accept. The skepticism is warranted. We can identify people with superior education and intellectual endowments, or think we can. But we have no reason to think they would be better than others at making moral choices in living their own lives, let alone in deciding how other people should live theirs. William Buckley supposedly once said he would rather “entrust the government of the United States to the first 400 people listed in the Boston telephone directory than to the faculty of Harvard University.” He was right. The ability to analyze and to write is not the ability to choose wisely and well (a point Buckley himself sometimes overlooked).

Nevertheless, to consider what would be done in an imaginary society ruled by the virtuous is a useful thought experiment. It gives us perspective on the role that paternalism should play in a democratic society such as our own. Surprisingly, the chief difference turns out to be how wary the leaders of a democratic state should be in preferring their own decisions to those of their citizens. They should be more wary about acting in the first and second of the three ways we have described in legally prohibiting or requiring their citizens to act a certain way, and in admonishing them how to act without imposing a legal sanction. That is so even though their admonitions are likely to be less effective than they would be in our hypothetical aristocracy. As we will see, however, they should be less wary about acting in the third way: by allocating resources directly to activities they deem worthwhile.

134. See supra Part II.C.1.
The reason for the similarity is that in the Aristotelian tradition, the choices people make matter in a democratic society for the same reason they would in a society differently constituted. Making the right choices contributes to the distinctively human life which it is the ultimate end of every human being to live.\textsuperscript{135} According to Aristotle, a mistake that democracies characteristically make, and one which can lead to their ruin, is to think that the freedom of a citizen means doing what he likes instead of what he should. Each person should use his freedom to live the most worthwhile life he can. Moreover, the end of a democracy is the same as that of every government: that everyone “whoever he is, can act best and live happily.”\textsuperscript{136} Consequently, a democratic government will be concerned when its citizens make wrong choices.

Consequently, many of the reasons for not legally prescribing how citizens should choose are the same in a democratic society as in our hypothetical aristocracy. There will still be decisions that have no single right answer. There will be some that a citizen can best make for himself, not because of a greater ability to choose, but because each citizen best knows himself and his circumstances. Part of a good human life will still entail making one’s own decisions even if they are not the best ones. A person must still be allowed to make wrong decisions if he is to learn to make better ones. And sometimes, it is pointless for the state to require or prohibit a choice because people will continue to act the same way, even if, like most cigarette addicts, they know they are acting wrongly. That is why, in discussing our imaginary aristocracy, we were able to use, as illustrations, measures which are frequently taken or avoided by modern democratic governments.\textsuperscript{137} The reasons for taking or avoiding them are the same.

The principal difference is that the leaders of a democracy should be more hesitant to prohibit or require an action legally because they cannot be as confident they are right. One hopes, of course, that in a representative democracy, the citizens will choose leaders who are wise. Late in his life, Thomas Jefferson wrote John Adams that the one point on which he was sure they both agreed was that

\textsuperscript{135} See supra notes 12-13 and accompanying text.
\textsuperscript{136} ARISTOTLE, supra note 15, bk. 7, ch. 2, 1324a, at 1279.
\textsuperscript{137} See supra p. 1756.
the best government was one in which the most virtuous citizens were chosen to lead.\textsuperscript{138} Their disagreement, according to Jefferson, was that he trusted the people to choose the most virtuous, whereas Adams trusted the rich.\textsuperscript{139} But in an aristocracy one assumes one's leaders are the wisest. In a democracy, one only hopes that they are. In an aristocracy, the choice of who will be the wisest leaders is made by those who are presumed to be wise. In a democracy, the choice is made by everybody. Thus, the position of leaders in a democracy is somewhat like that of a scholar who is elected to receive an honor by people who do not claim to be experts in his field. Accordingly, democratic leaders should be cautious about relying on their own wisdom in deciding when the choices of their citizens should be overridden.

Leaders in democracies should be particularly cautious when they find their own views at odds with those of citizens generally. Even if the leaders are the wisest, the prevailing view of the people may be sounder. As Aristotle said, the conclusions of a large number of people may be sounder because their opinions are more varied.\textsuperscript{140} He likened decision making by the people to a banquet which is improved if everyone contributes something different.\textsuperscript{141} A modern decision theorist might say that the extreme and foolish positions will cancel each other out, so that the final position is the one to be trusted. Thus, even the leaders in an aristocracy have reason to respect the people's views. Confucians regarded the satisfaction of the people as an index of the success of the government. Catholic leaders have said \textit{vox populi vox dei}, and that the faith is what has been believed \textit{semper et ubique et ab omnibus}. Moreover, in an aristocracy, the people are not charged either with making collective decisions or with choosing their leaders. In a democracy, people must consider public issues in order to vote. Their opinions will therefore be entitled to more respect. Even when the leaders of a democracy are not concerned simply with being reelected, they should be reluctant to override the people's views.

\begin{thebibliography}{9}
\bibitem{139} Id.
\bibitem{140} \textit{ARISTOTLE, POLITICS} III, xv.
\bibitem{141} Id.
\end{thebibliography}
As described earlier, a government can also influence the choices people make by endorsing or condemning conduct that it does not legally require or prohibit. The advantages and disadvantages of doing so will be the same. Admonitions not backed by legal sanctions can be more general. They can be framed as ideals or principles which a person can apply differently depending on who he is and what his circumstances are. Admonitions can also guide people while leaving them free to choose for themselves. They have the disadvantage that people can choose to disregard them.

One difference is that leaders in the hypothetical aristocracy can expect their admonitions to have considerable force even without a legal sanction. In a democracy, for the reasons just described, a citizen will rightly be more skeptical of the wisdom of his leaders. He will also have a greater respect for widely-accepted public opinion. That is not to say the leaders in a democracy should never defy public opinion. In so doing, they may at least encourage people to rethink matters they previously took for granted. But the admonitions of leaders in a democracy are most likely to be heeded when they are supported by public opinion, or at least by a large and respected body of the public.

One can think of examples in which such admonitions have worked effectively and well. One example is the admonitions of the Roosevelt administration on the protection of workers, admonitions that influenced the choices of both employers and of workers themselves. The National Recovery Act was a voluntary program in which industries that complied were allowed to display a symbol of their compliance. Organized labor was strengthened, not merely by legislation, but by the slogan: "The president wants you to join a union." The civil rights movement is another example. African Americans were helped, not only by the Fair Housing Act and the Civil Rights Act, but by a denunciation of racism supported both by the government and a large segment of public opinion. A contemporary example may be the effect of government admonitions, supported by public opinion, about the evils of smoking.

Here again, however, the leaders and the citizens of a democratic society should be more hesitant to act because they should be more aware of the danger that they may be wrong. Neither group can be

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142. See supra Part II.C.1.
as confident of its ability to make the right choice as our hypothetical virtuous leaders of an aristocracy. When democratic leaders are wrong and they are backed by public opinion, the results can be grim even absent criminal sanctions. One need only remember the witch hunts of the McCarthy Era.

Third, a democratic state should behave differently in doing distributive justice. One difference is that it will be pursuing a different ideal. Aristotle said that democratic societies regard the ideally fair distribution as one in which each citizen has the same share of resources, whereas aristocracies would ideally allocate wealth in proportion to virtue.\textsuperscript{143} As mentioned, both societies will have to compromise this ideal in order to provide incentives for labor and property management. Consequently, both will face the problem of how far their respective ideals should be compromised.

Nevertheless, the leaders of a democratic society should be less wary of acting paternalistically in the third way described earlier:\textsuperscript{144} by directly allocating resources to activities which they deem worthwhile. The reason is that in a democracy, two ideals are in tension. One is the ideal that should guide the distribution of resources: each citizen should have an equal share, although pragmatic considerations may require that ideal to be compromised. The second is the ideal that is the goal of all government: that everyone “whoever he is, can act best and live happily.”\textsuperscript{145} The two ideals are in tension because if all resources were divided equally, many worthwhile activities would be more neglected than if more resources were in the hands of our hypothetical virtuous rulers who, by hypothesis, can better decide which activities are most worthwhile. The ideal that each citizen should have an equal share does not rest on any supposition that each citizen is equally capable of using resources well, or even that the ends for which each citizen will use his resources are equally valuable.

If this ideal were adhered to strictly, some people could not pursue some very worthwhile ends because they need more leisure and more funds to do so than other people. An example would be a physicist engaged in empirical research which requires much time

\textsuperscript{143} See supra note 32 and accompanying text.
\textsuperscript{144} See supra Part II.C.1.
\textsuperscript{145} ARISTOTLE, supra note 15, bk. 7, ch. 1, 1324a, at 1279.
and expensive equipment but has no commercial or military value. Another would be a violinist, an artist, or a poet who is gifted but unable to practice, paint, or write on the amount for which his work sells. Sometimes, the value of their work may be so well understood that the citizens of a democracy will contribute funds sufficient to support it.

But it will still be easier to find support when the value of an activity is more widely understood. For instance, the environmental movement has been successful in raising funds for its worthwhile activities because everyone wants an environment conducive to human survival and because most people appreciate the kind of beauty that environmental organizations work to preserve. The value of some kinds of knowledge and culture is appreciated less widely. Consequently, life may be more secure for an old redwood than a young physicist, violinist, artist, or poet—although the physicist may do better than the others because people may exaggerate the practical value of his work, and because he may be employed in a university where parents who wish to provide their children with an elite education are made to sponsor academic research.

Consequently, the leaders of a democracy should be more willing than those of our hypothetical aristocracy to allocate resources directly to activities which they deem to be more worthwhile. In doing so, they will deviate from the democratic ideal of an equal distribution of resources. But they will also minimize the price that their society would otherwise pay on account of its democratic ideal: that certain worthwhile activities will be foregone. That price may be worth paying given the many advantages of living in a democratic society. But still, the price can be minimized without seriously compromising the ideal. It is minimized by sponsoring scholarly and scientific research and artistic production. It is minimized most effectively, Robert Cooter and I have argued, by allocating funds to institutions staffed by people in a position to decide how resources can best be used. Fewer mistakes will then be made than if government leaders allocate funds according to

their own conceptions of what might be of intellectual, cultural or scientific value, or those of the groups with the funds and organization to lobby effectively.\textsuperscript{147}

CONCLUSIONS

One conclusion we have reached is that whether or not one is living in a democratic society, the state need not be acting paternalistically when it influences or interferes with the contracts its citizens enter into. It may merely be doing distributive or commutative justice. The normal way for a government to operate is to promote a fair share of purchasing power for its citizens, and then leave them free, so long as they act fairly, to earn and spend as they see fit. That is why this Essay has not been concerned with such efforts to promote equality as setting a minimum wage, or with such contract doctrines as unconscionability to prevent unfairness. Such measures are often characterized as paternalistic, but they are not, in our sense, when they are used merely to do justice. In contrast, the state does act paternalistically when it objects to the contracts citizens enter into to earn or to spend because it thinks they have chosen wrongly.

Another conclusion is that the circumstances in which a government should paternalistically influence or interfere with these voluntary arrangements are much the same in a democracy as they would be in an imaginary society ruled by the very wise. They are, that is, if the leaders are pursuing what Aristotle thought to be the goal of every government: that each person, "whoever he is, can act best and live happily."\textsuperscript{148} The principal difference concerns how wary the leaders of these societies should be in restricting or influencing the choices their citizens make. The leaders of a democratic society should be more wary both in legally prescribing how their citizens should act and in giving admonitions which are not backed by legal sanctions. They should be less wary of directing resources to activities that they believe their citizens undervalue.

It should be emphasized that while this conclusion holds in the situations we have been considering—the contracts that citizens

\textsuperscript{147} See id.

\textsuperscript{148} See ARISTOTLE, supra note 15, bk. 7, ch. 2, 1324a, at 1279.
make to gain or to spend money in ways they think worthwhile—and while it may hold in other situations as well, it does not hold universally. In a democracy, citizens have civic responsibilities which those who live in an aristocracy do not. They vote. They read newspapers and hold meetings and discussions to inform themselves how to vote. Their freedom to do so is not only necessary to the proper functioning of a democracy, but it benefits the citizens themselves. In exercising their civic responsibilities, they are making choices which, like some of those described earlier, contribute to a distinctively human life.\footnote{149} The ability of each citizen to make such choices is one of the blessings of democracy. The circumstances in which democratic leaders should attempt to interfere with them or influence them will be more starkly limited based on different considerations than when they restrict or influence the contracts by which citizens can earn or spend money as they see fit.

Subject to that limitation, however, another conclusion follows. Whether a democratic state should act paternalistically as to the voluntary arrangements we have discussed cannot be derived from any characteristically democratic concept of freedom. Since the foundation of the American republic, some people have thought that if only the concept of freedom in a democracy were properly understood, one could see how the state should deal with that question. Some have concluded that it should never act paternalistically. From John Stuart Mill to the pre-New Deal Supreme Court, that argument was used to claim that the state should not enact safety legislation. Some use the same argument now to oppose legislation governing the commercialization of sex or the sale of drugs. Then there are people who deny that state action is paternalistic when it is directed against conduct they do not like, and condemn it as a violation of democratic freedom when it is directed against conduct they approve or regard as innocuous. But there is no way of dodging such questions as whether certain conduct is right or wrong, of whether it is right or wrong for everyone under all circumstances or only for some people some of the time, and of how valuable it is for individuals to make certain choices for themselves. These questions concern what limits the

\footnote{149. See supra notes 32, 112 and accompanying text.}
state should set on individual freedom and what kinds of freedom are most important. One cannot find answers merely by analyzing the concept of freedom. That is so, at least in the Aristotelian tradition in which choices matter, neither because freedom is an end in itself nor because people can thereby gratify their preferences, but instead because good choices contribute to a worthwhile life.

A third conclusion is that while answers to such questions depend on the use of reason, they cannot be discovered by logical analysis. In the Aristotelian tradition, answers to such questions require the exercise of prudence, whether that of government leaders or of citizens. Some forms of state action may be so likely to impinge on the important types of freedom that the prudent course of action would be to limit constitutionally how the state can act. But when to do so is a question that only prudence can answer.

This Essay may have disappointed the reader because it does not attempt to prove which particular voluntary arrangements the state should prohibit, require, encourage, discourage, or fund. If those issues were subject to proof, academics should rule the world. In our society, such decisions must be left to the prudence of the citizens, to that of leaders whom one hopes are prudently elected, and subject to constitutional constraints that one hopes are prudently imposed. That is as one might expect in a representative democracy.