

**Freedom of choice and paternalism in contract law:
prospects and limits of an economic approach**

Thesis

**submitted in partial fulfillment of the requirements
for the Degree of Doctor in Law
at the University of Hamburg, Faculty of Law**

by Péter Cserne

Supervisor: Prof. Dr. Hans-Bernd Schäfer

Preface

After attending the Erasmus Program in Law and Economics in the academic year 2003/04 at the University of Hamburg, I returned to the Hanseatic City for almost three more years. From 2005 I had the privilege to be a member of the Doctoral Program of the Institute for Law and Economics (Graduiertenkolleg Recht und Ökonomik) and have Professor Hans-Bernd Schäfer as my thesis supervisor. I am grateful to him, other professors and fellow graduates, in and around the Graduiertenkolleg, for many inspiring interactions, both academic and non-academic, during my Hamburg years.

The generosity of the program made it possible for me to discuss my research ideas with scholars at other universities. Between 2005 and 2007 I presented the draft of several portions of this thesis at conferences and workshops in Hamburg, Turin, Siena, Saarbrücken, Haifa, Rome, Kassel, Berlin, Krakow, Copenhagen and Milan. I also benefited much from the research semester I spent in New York City as a visiting fellow at the Law School of Columbia University in spring 2007.

I am happy to express my gratitude here to my family, colleagues and friends who contributed in many ways, knowingly or not, to the formation of this work. For the imperfections of which I, of course, bear sole responsibility.

Budapest, January 2008

P. Cs.

CONTENTS

PREFACE	I
1. INTRODUCTION: MOTIVES AND METHODS	1
1.1. MOTIVATION	1
1.2. ILLUSTRATING THE PROBLEM	1
1.3. METHODOLOGY	5
1.3.1. Economists learning from law?	5
1.3.2. Interdisciplinarity.....	7
1.3.3. The policy perspective.....	10
1.3.4. Extending standard methods.....	12
1.4. THE PLAN.....	14
2. PATERNALISM.....	16
2.1. CONCEPT AND TYPES OF PATERNALISM	16
2.1.1. Concept.....	16
2.1.2. Hard and soft paternalism	18
2.1.3. Paternalism and modernity.....	19
2.2. JUSTIFICATORY QUESTIONS	21
2.2.1. Freedom and benevolence.....	21
2.2.2. Philosophical positions	23
Deontology and autonomy	23
Consequentialism and welfare.....	25
Perfectionism and virtue.....	26
2.2.3. Paternalism and consent.....	29
Prior consent	29
Anticipated consent.....	30
Collective self-paternalism and democratic legitimacy.....	31
Hypothetical consent.....	32
2.2.4. Problems of legal paternalism	33
Reason and legislative intent.....	34
Rules and reasons: the theoretical over-determination of rules	34
Over- and under-inclusiveness of rules	36
2.2.5. Non-paternalistic reasons for protective regulation	37
Third-party effects.....	38
Legal moralism	40
Fear of commodification	41
2.2.6. Pragmatic antipaternalism.....	43
2.3. PATERNALISM IN ECONOMIC THEORY	45
2.3.1. Redefinitions of paternalism in economic theory.....	45
Market failures	46
Merit goods	46
“Irrational” preferences.....	47
Beyond welfarism	49
2.3.2. The need for empirical foundations	50
2.4. PSYCHOLOGY ALIAS BEHAVIORAL LAW AND ECONOMICS	51
2.4.1. Empirical findings.....	52
2.4.2. Policy implications.....	55
2.4.3. New regulative ideas.....	57
“Asymmetric paternalism”	58
“Libertarian paternalism”	59
“Debiasing through law”	59
2.5. OVERLAPPING CONSENSUS IN A LIMITED DOMAIN.....	60

3. CONTRACT THEORY	62
3.1. THE WORLD OF CONTRACTS VS. THE WORLD OF CONTRACT LAW	62
3.2. ACCOUNTING FOR CONTRACT LAW	66
3.2.1. <i>Will theory: the doctrinal view</i>	66
3.2.2. <i>Freedom of contract and the private ordering paradigm</i>	68
3.2.3. <i>Autonomy and welfare: towards a unified contract theory?</i>	71
Buckley	71
Gordley	72
Craswell	74
Kraus	74
3.3. THE ECONOMICS OF CONTRACT LAW	75
3.3.1. <i>Enabling and regulation</i>	75
3.3.2. <i>Regulation: ex ante and ex post</i>	76
3.3.3. <i>Regulatory doctrines of contract law</i>	77
4. PATERNALISTIC DOCTRINES IN CONTRACT LAW	80
4.1. MANDATORY AND DEFAULT RULES	80
4.1.1. <i>The “default rule paradigm”</i>	80
4.1.2. <i>Problems with the dichotomy</i>	84
Blurred distinctions	84
Mandatory rules from the bad man’s view	85
Sticky default rules	86
4.2. VOLUNTARINESS AND THE “CONSTITUTIVE LIMITS” OF CONTRACTUAL FREEDOM	88
4.2.1. <i>Incapacity</i>	89
4.2.2. <i>Formation defenses</i>	93
4.2.3. <i>Coercion and exploitation</i>	94
4.3. PROCEDURAL LIMITS OF FREEDOM OF CONTRACT	96
4.3.1. <i>Formal requirements</i>	98
Comparative overview	98
Common features and trends	102
Paternalism and formalities	103
Non-paternalistic functions	105
4.3.2. <i>Mandatory cooling-off</i>	108
4.3.3. <i>Mandatory advice</i>	112
4.3.4. <i>Information provision and disclosure</i>	114
4.4. SUBSTANTIVE LIMITS OF FREEDOM OF CONTRACT	117
4.4.1. <i>Unconscionability and unfairness: procedure and substance</i>	118
4.4.2. <i>‘Immorality’ as paternalism?</i>	125
4.5. PATERNALISM THROUGH CONTRACT INTERPRETATION: THE CONTRA PROFERENTEM RULE	126
4.5.1. <i>Policy purposes and the incentive effects of contract interpretation</i>	126
4.5.2. <i>Comparative overview</i>	128
Origins and Continental development	129
Common law development	131
Standard form contracts	132
Consumer contracts	135
4.5.3. <i>The contra proferentem rule as a policy instrument</i>	136
Protection of the weak?	137
Regulation of standard forms and consumer contracts	138
Optimally clear drafting	141
4.5.4. <i>An example: insurance policy interpretation</i>	145
4.5.5. <i>Against paternalism through contract interpretation</i>	149
4.6. PATERNALISM IN A COMPLEX LEGAL SYSTEM	150
4.6.1. <i>Comparison, interaction and choice between regulatory instruments</i>	150
Disclosure and unconscionability compared	150
Contract law vs. regulation: institutional competence	151
Consumer law vs. general contract law	152
4.6.2. <i>Backwards induction from competence?</i>	153

5. CONCLUSION	155
5.1. CONTRACT REGULATION: SUMMARY ASSESSMENT	155
5.2. FROM PRINCIPLE TO POLICY: MEDIATING MAXIMS	156
Transparency	157
Constitutional values vs. direct moralism.....	157
Harm-prevention and basic goods.....	158
Minimal intrusiveness	159
REFERENCES	160