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Where Is the Freedom in Freedom of Contract?: A Comment on Trebilcock's the Limits of Freedom of Contract

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Where Is the Freedom in Freedom of Contract?: A Comment on Trebilcock's the Limits of Freedom of Contract

Abstract

Michael Trebilcock's recent exploration of the limits of freedom of contract systematically considers both the instrumental and the intrinsic value of freedom or autonomy in an economic analysis. A third way of thinking about the value of freedom of contract is to take it as a presupposition of contract law: that is, freedom of contract is not just instrumentally or intrinsically desirable, but is conceptually necessary to contract law. Two examples are presented to suggest that by not considering this third perspective, Trebilcock leaves himself without a structure in which to deal with some of the issues that trouble him.

Keywords

Trebilcock, M. J.; Liberty of contract

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WHERE IS THE FREEDOM IN FREEDOM OF CONTRACT? A COMMENT ON TREBILCOCK'S *THE LIMITS OF FREEDOM OF CONTRACT*®

BY HAMISH STEWART*

Michael Trebilcock's recent exploration of the limits of freedom of contract systematically considers both the instrumental and the intrinsic value of freedom or autonomy in an economic analysis. A third way of thinking about the value of freedom of contract is to take it as a presupposition of contract law: that is, freedom of contract is not just instrumentally or intrinsically desirable, but is conceptually necessary to contract law. Two examples are presented to suggest that by not considering this third perspective, Trebilcock leaves himself without a structure in which to deal with some of the issues that trouble him.

L'exploration récente de Michael Trebilcock, quant aux limites de la liberté de contrat, considère de façon systématique la valeur instrumentale ainsi qu'intrinsèque de la liberté ou de l'autonomie dans une analyse économique. Une troisième façon de penser à la valeur de la liberté de contrat est de considérer cela comme une présupposition du droit des contrats. C'est-à-dire, la liberté de contrat n'est pas seulement souhaitable, du point de vue instrumentale ou intrinsèque, mais elle est conceptuellement nécessaire au droit des contrats. Les deux exemples présentés suggèrent que l'absence de cette troisième perspective dans le travail de Trebilcock résulte dans un manque de structure dont il serait possible d'aborder certaines des questions qui préoccupent l'auteur.

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* Assistant Professor, Faculty of Law, University of Toronto. I have had the advantage of access to a draft of Michael Trebilcock's "Rejoinder" while revising this comment. I also thank Ernie Weinrib, Alan Brudner, Peter Benson, Richard Craswell, Robert Howse, and other participants in the 24th Annual Workshop on Commercial and Consumer Law (Faculty of Law, University of Toronto, October 1994) for their difficult and helpful questions, not all of which are answered here.

I. INTRODUCTION

There are at least three ways to think about the importance of freedom of contract. First, freedom of contract might promote general welfare, economic efficiency, or some other goal. This instrumental approach to valuing freedom of contract is characteristic of economic analysis of law.¹ Second, freedom of contract might be valuable in its own right; apart from its instrumental value, freedom of choice might be a good thing in itself. Perhaps people are happier when they are able to choose for themselves, or perhaps having more choices is a good thing, quite apart from its effect on efficiency or welfare.² Third, freedom of choice might be presupposed in the doctrines of contract law, in that those doctrines treat the contracting parties as autonomous agents who are free and equal in the sense that they have an abstract capacity to enter into contracts. On this view, whether or not freedom of contract is instrumentally or intrinsically valuable, it is an inescapable aspect of contract law.³

Michael Trebilcock's recent exploration of the limits of freedom of contract systematically considers the first two of these perspectives. In this regard, Trebilcock's work represents an advance on traditional economic analysis of law, which all too often has contented itself with a merely instrumental analysis of freedom, without considering the value that freedom might have in its own right.⁴ Trebilcock is concerned with the "convergence thesis" that private ordering—by which he means roughly the use of the market to determine the production, allocation, and distribution of most goods—"simultaneously promotes individual freedom (autonomy) and social welfare,"⁵ and with the role of freedom of contract—meaning both allowing individuals to make their own decisions about what agreements to enter into and enforcing strictly

¹ M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) at 15-17.

² *Ibid.* at 22; A.K. Sen, "Freedom of Choice: Concept and Content" (1988) 32 *European Econ. Rev.* 269 at 270-72 [hereinafter "Freedom of Choice"].

³ E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995) at 136-40; P. Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory" (1989) 10 *Cardozo L. Rev.* 1077.

⁴ See, for example, R.A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown, 1992) c. 4. I am not suggesting that Posner does not assign any intrinsic value to freedom, but that this value plays no role in his analysis of freedom of contract. Sen, in "Freedom of Choice" *supra* note 2, notes other areas of economic analysis in which the intrinsic value of freedom tends to be neglected.

⁵ Trebilcock, *supra* note 1 at 241.

those agreements—in private ordering. While Trebilcock does not find the convergence thesis particularly compelling, it is clear that he regards freedom of contract as both a vital instrument in the pursuit of welfare and a crucial guarantor against the usurpation of individual autonomy by governments or tyrannical majorities.

In this comment, I want to suggest that despite Trebilcock's welcome consideration of the intrinsic value of autonomy, his exclusion of the third perspective on freedom of contract leads him astray. By not considering the extent to which freedom of choice is presupposed by contract law, he leaves himself without a structure in which to deal with some of the issues that trouble him. Trebilcock himself notes that "in justifying the general claim ... that more individual freedom of choice is better than less, it is difficult to avoid ultimately being driven to a consequentialist rationale, probably with utilitarian (or welfare) connotations."⁶ The intrinsic value that he places on autonomy requires him to resist this slide from autonomist values to welfarist ones, but without a structure that takes the autonomy of contracting parties not just as a good in itself but as a necessary conceptual feature of contract law, he is unable to resist this collapse. To support my suggestion, I consider two examples from Trebilcock's book and show not only that his welfarist analysis drives his approach to autonomy values both times, but also that a consideration of the conceptual necessity for freedom of contract might prevent this subordination.

II. COMMODIFICATION

Trebilcock begins his substantive analysis with a problem that is rarely even acknowledged in economic analysis: whether "certain human attributes or resources should lie wholly or partly beyond the exchange process, because to allow full commodification would be inconsistent with theories of personhood or human flourishing."⁷ But something odd happens between his asking the question and his answering it: after considering commodification "in five difficult and controversial contexts,"⁸ Trebilcock concludes that just about everything should be commodified. How does this conclusion come about? I suggest that it is Trebilcock's neglect of the role of autonomy as a fundamental

⁶ *Ibid.* at 247 [footnote omitted].

⁷ *Ibid.* at 23.

⁸ *Ibid.* at 56.

presupposition of contract law that leads him to this conclusion.

I will take just one of Trebilcock's five examples and show how his disregard for the underlying structure of contract law causes him to miss important questions. Consider surrogacy contracts, in which "a married couple ... arrange for a fertile female to be impregnated artificially with the sperm of the would-be father, to carry the foetus to term, and to relinquish it ... for adoption"⁹ in exchange for financial compensation (usually, the couple cannot have its own children). The advantages of surrogacy contracts, from a purely economic point of view, are the same as the advantages of any other contract: we presume that voluntary exchanges benefit both parties to the exchange, and therefore, in the absence of externalities, raise aggregate welfare. But surrogacy contracts are open to a number of familiar objections, two of which have particular bearing on the issue of commodification. First, some people argue "that payment for the birth mother's role in the arrangement commodifies and debases an intrinsic element of her personhood, in this case, her reproductive faculties. ... [S]urrogate motherhood embraces an offensive form of utilitarianism insofar as it involves the use of one person as a means to the ends of others."¹⁰ Second, surrogacy, by commodifying the child as well as the mother's labour, "may result in adverse consequences for the welfare of the child, who may not see himself or be perceived by his parents as intrinsically valuable."¹¹

In response to these objections, Trebilcock uses both economic and feminist arguments, but his arguments are all consequentialist. With respect to the first objection, Trebilcock notes that *all* contractual exchanges involve the use of one person by another: "This is simply another way of saying that both parties benefit from an exchange."¹² He also points to potential beneficial consequences of surrogacy in "transform[ing] the confining stereotype of 'womanhood as motherhood'" and reinforcing women's "full dominion and autonomy over their bodies."¹³ With respect to the second objection, Trebilcock notes that raising a child, whatever its genetic origins, costs a lot of money; he argues that this expenditure "does not seem to have

⁹ *Ibid.* at 48.

¹⁰ *Ibid.* at 50 [footnotes omitted]. Trebilcock attributes this objection to a number of writers, including M.J. Radin, "Market Inalienability" (1987) 100 Harv. L. Rev. 1849 at 1929-30; E. Anderson, "Is Women's Labor a Commodity?" (1990) 19 Phil. & Pub. Aff. 71 at 80-87.

¹¹ Trebilcock, *ibid.* at 52; see Anderson, *ibid.* at 75-80.

¹² Trebilcock, *ibid.* at 50.

¹³ *Ibid.* at 51.

destroyed the love most parents feel for their children, and it is difficult to believe that allowing commercial surrogacy contracts is antithetical to this love."¹⁴ Thus, Trebilcock concludes that surrogacy contracts should not be considered contrary to public policy; while he proposes a legal regime that would formalize the surrogate mother's right to repudiate the contract and keep the baby, he remains generally optimistic that permitting surrogacy contracts would have beneficial consequences.¹⁵

But if Trebilcock is correct in his responses to the commodification objections, it is hard to see on what grounds he would object to straightforward baby-selling: if people generally benefit from voluntary exchanges, and if surrogacy does not devalue children, then why would a full-fledged market for adoptions not also be a wise policy? One might ask further why a person cannot sell himself or herself into slavery, and Trebilcock cannot quite bring himself to object to such contracts. In a curious passage, commenting on John Stuart Mill, he assimilates the arguments against voluntary enslavement to those for the prohibition of narcotics:

[Mill] regarded such contracts as inconsistent with basic notions of individual self-fulfillment or perhaps human flourishing. But then ... how would he be able to avoid the slippery slope argument that all kinds of other conduct, such as the use of narcotic drugs, cigarettes, and alcohol, are also often highly self-destructive and likely to reduce dramatically the scope of one's future liberties? It might be rejoined that slavery contracts are such an extreme case of future liberty-restricting conduct that in most instances ... one should infer either coercion, ignorance of relevant facts, or cognitive deficiencies, and that this presumption is so strong that it is not worth investigating each case to determine whether it might fall outside the presumption. ... [T]he difficulty with this position is that at base it entails a form of moral majoritarianism where activities are condemned as "free-floating evils," irrespective of any demonstration of harm to third parties from them. The limits on this kind of collective intervention in the domain of individual choices are far from self-evident.¹⁶

While I am sure Trebilcock would endorse neither baby-selling nor contracts of enslavement, he appears unpersuaded by his own instrumental arguments, based on externalities or paternalism, against them. But other arguments are both available and necessary.

If the law of contract is concerned with the interaction of free and autonomous agents in making voluntary exchanges, then there must be something that cannot be subject to contract, namely, the agent's capacity to contract, or autonomy itself. It would be contradictory to suppose that the very feature of an agent that made contractual

¹⁴ *Ibid.* at 52.

¹⁵ *Ibid.* at 53-56.

¹⁶ *Ibid.* at 162 [footnotes omitted].

exchange possible could itself be permanently exchanged; the agent would in effect simultaneously deny and assert his or her capacity to contract. This is essentially Hegel's argument that selling oneself into slavery would be contradictory;¹⁷ the argument is best appreciated in the contrast Hegel draws between wage labour and slavery:

I can give ... [someone else] the use of my abilities for a restricted period, because, on the strength of this restriction, my abilities acquire an external relation to the totality and universality of my being. By alienating the whole of my time, as crystallized in my work, and everything I produced, I would be making into another's property the substance of my being, my universal activity and actuality, my personality.¹⁸

Whether Hegel was right to leave wage labour in the category of things that can be alienated is a question that I will not address here,¹⁹ but he was clearly right to assert that some aspects of human labour are inalienable; otherwise, there would in principle be no human agency left to alienate things, or indeed to possess them.

Thus the objection that surrogacy "commodifies and debases an intrinsic element of ... personhood"²⁰ cannot be dismissed as easily as Trebilcock supposes, because it rests not only on the consequentialist arguments that he identifies, but also on the argument that reproductive capacity is so closely tied to a person's agency that it cannot be alienable. Similarly, the objection that surrogacy is merely a form of baby-selling rests not just on consequentialist arguments but also on the idea that there is something contradictory about selling human beings: if I cannot alienate my own agency through the market, it would seem implausible that I could alienate a baby through the market (even if that alienation

¹⁷ G.W.F. Hegel, *Philosophy of Right*, trans. T.M. Knox (London: Oxford University Press, 1952) at ¶66 (Remark). See also J.S. Mill, *Utilitarianism, On Liberty, and Considerations on Representative Government*, ed. by H.B. Acton (London: Everyman, 1972) at 157-58. As we have seen, Trebilcock, *ibid.* at 161-62, interprets this passage in consequentialist terms, but I suggest that a conceptual reading is also possible.

¹⁸ Hegel, *ibid.* at ¶67. The Addition to this paragraph makes it clear that Hegel intended to contrast wage labour and slavery. See also I. Kant, *The Metaphysics of Morals*, trans. M. Gregor (Cambridge: Cambridge University Press, 1991) at 139.

¹⁹ Radin, *supra* note 10 at 1894, suggests that this argument of Hegel's is purely conclusory, and Trebilcock, *supra* note 1 at 24 appears to agree with her. In contrast, Anderson's argument, *supra* note 10, that women's reproductive labour should not be commodified seems ultimately to suggest that labour generally should not be commodified. This argument goes back at least to Marx, for whom wage labour had something of the same contradictory character that Hegel attributed to slavery. Marx argued that wage labour involved the worker in a systematic means/ends reversal where labour, which ought to be an essential aspect of life, becomes a mere instrument for survival: "Life itself appears only as a *means to life*": K. Marx, *Economic and Philosophic Manuscripts of 1844*, trans. M. Milligan (New York: International Publishers, 1964) at 113.

²⁰ Trebilcock, *ibid.* at 50.

does not involve selling the baby into slavery).²¹ These arguments will not necessarily be decisive against surrogacy contracts, but it seems to me that arguments of this sort are the only ones that can arrest Trebilcock's slide to the position that questions of commodification—selling oneself into slavery, baby-selling, surrogacy, prostitution, wage labour—can be determined with arguments that are exclusively empirical and consequentialist. Contract law depends on the assumption that the parties are free and autonomous agents, and there are some contracts that such agents cannot make without denying their own freedom and autonomy.²²

III. COERCION

Most accounts of coercion in the philosophical literature proceed by attempting to match a series of fairly standard examples with the author's intuitions.²³ In each example, one person, α , is attempting to get another, β , to do or to promise something. To this end, α makes a proposal to β that changes β 's opportunities in some way. Consider the following familiar examples:

- A. *The Armed Robber.* "An armed robber threatens his victim on a dark and lonely street: 'Your money or your life.'"²⁴ The victim hands over his money.
- B. *The Altruistic Robber.* The armed robber wants his victim's watch, which the victim and the market value at \$500. The robber is aware of these valuations, and yet has an idiosyncratic desire for this particular watch. He points his gun at his victim, and says "Your watch for \$1000, or your life" (*i.e.*, "Sell me your

²¹ In his "Rejoinder," (1995) 33 Osgoode Hall L.J. 355 at 367, Trebilcock suggests that my argument here entails a pro-life position in the abortion debate. This conclusion would follow only if (1) the fetus were an autonomous person, and (2) the fetus's rights and interests would always trump the mother's. I hold neither of these positions. No compelling arguments have been advanced for recognizing the fetus as an autonomous person; but even if the fetus were accorded this status, its rights could not be spelled out without careful attention to the autonomy of the mother. See M. Shaffer, "Foetal Rights and the Regulation of Abortion" (1994) 39 McGill L.J. 58.

²² For an example from the case law, see *Horwood v. Millar's Timber and Trading Co., Ltd.*, [1917] 1 K.B. 305. The English Court of Appeal refused to enforce a contract which, though not amounting to enslavement, excessively restrained one party's freedom of action.

²³ This section draws heavily on a larger work in progress, begun under Professor Trebilcock's supervision: H. Stewart, *A Formal Approach to Contractual Coercion* (Toronto, 1995) [unpublished].

²⁴ C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, Mass.: Harvard University Press, 1981) at 95; compare Trebilcock, *supra* note 1 at 84-85.

watch for \$1,000"). The victim agrees to sell the watch.²⁵

- C. *The Foundering Ship*. A tugboat, α , happens upon a ship, β , in distress. In return for a promised fee greatly in excess of the normal charge, the tug tows the ship to safety.²⁶
- D. *The Lecherous Millionaire*. α , the Lecherous Millionaire, "will pay for the expensive surgery that alone can save her [β 's] child's life provided that she becomes for a period his mistress."²⁷
- E. *The Penny Black*. "One stamp collector offers another a 'Penny Black' at a steep price, knowing that the buyer needs just this stamp to complete a set."²⁸ The buyer, β , agrees to the seller's, α 's, price.
- F. *The Competitive Grocer*. One of several competitive grocers, α , in an affluent suburb offers peas for sale at a competitive price. A Shopper, β , buys some peas from the Grocer.²⁹
- G. *The Starving Peasant*. One of several competitive rice merchants, α , in the Bengal famine of 1943 offers rice for sale at five times the pre-famine price. Outside his store, people starve to death; however, one Starving Peasant, β , convinces the Merchant to sell him some rice on credit.³⁰

Everyone agrees that A involves coercion and that F does not; it is the other cases that present problems. Most accounts say that β is coerced by α 's proposal if the proposal makes β 's opportunities worse as compared with some "baseline" set of opportunities that β would, or should, have faced in the absence of α 's proposal. The accounts differ principally as to what the appropriate baseline is. Fried and

²⁵ Compare R. Nozick, "Coercion" in S. Morgenbesser, P. Suppes, & M. White, eds., *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's, 1969) 440 at 440: "If you go to the movies I'll give you \$10,000. If you don't go, I'll kill you." Compare J. Feinberg, *Harm to Self* (New York: Oxford University Press, 1986) at 217.

²⁶ Compare Trebilcock, *supra* note 1 at 85-86; Fried, *supra* note 24 at 109 (rescuers unloading cargo at a fraction of its value); Nozick, *supra* note 25 at 449 (drowning man); Feinberg, *supra* note 25 at 220-25 (drowning man); and A. Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987) at 207 (drowning man).

²⁷ Feinberg, *supra* note 25 at 229; compare Trebilcock, *supra* note 1 at 90-91; and Wertheimer, *supra* note 26 at 229-33.

²⁸ Fried, *supra* note 24 at 95; compare Trebilcock, *ibid.* at 87-90.

²⁹ Compare Fried, *ibid.*

³⁰ Compare Trebilcock, *supra* note 1 at 97-101 ("non-monopolized necessity"). For the Bengal famine, see A.K. Sen, *Poverty and Famines: An Essay on Entitlement and Deprivation* (Oxford: Clarendon, 1981) c. 6 (the increase in prices can be seen in Table 6.6 at 69); for starvation outside shops during that famine, see A.K. Sen, *Resources, Values and Development* (Cambridge, Mass.: Harvard University Press, 1984) at 458.

Wertheimer,³¹ among others, propose theories in which the baseline is moralized; that is, α 's proposal is not deemed to worsen β 's position unless the proposal is wrongful in some moral sense. Nozick and Feinberg,³² among others, propose theories in which β 's baseline is determined empirically or phenomenally; the question is then not whether α had a right to make his or whether the proposal wronged β in some way, but whether that proposal worsened β 's opportunities relative to what would have happened if α and β had never met.

Trebilcock criticizes moralized theories of coercion on the following ground: "while it is possible to determine whether A's proposal is coercive once B's moral base-line has been set, once B's moral base-line has been set all the interesting theoretical work will already have been done."³³ He therefore seeks a sort of empirical baseline, beginning by situating the question of freedom of contract within the paradigm of rational choice: "[t]he question is whether the constrained choices facing one of the contracting parties renders her consent to the express contract in question involuntary so as to vitiate that consent."³⁴ Trebilcock attacks the problem with three distinctions: exploitation versus creation of risk, life-threatening versus non-life-threatening risk, and monopoly versus non-monopoly. The Armed Robber, for example, both creates and exploits life-threatening risks, while the offeror of the Penny Black exploits, but does not create, non-life-threatening risk. The Starving Peasant finds himself in a non-monopolized but life-threatening situation. The other examples can be similarly classified. But for Trebilcock, these three distinctions are ultimately understood in terms of a fourth, situational versus structural monopoly:

In a situational monopoly ... it is the relatively fortuitous circumstances surrounding the interaction between the particular parties to the exchange which create the monopoly power that A opportunistically exploits in return for a quid pro quo that has no or negative social value ... or in respect of which B is induced to pay vastly more than the competitive or normal value of the services.

Generally in the case of structural monopolies ... the market power is non-transitory, obtains against all parties in the relevant market, and is exogenous to and precedes the particular circumstances of the interaction between parties to a given exchange.³⁵

Trebilcock concludes that "[t]he principal focus of a theory of coercion

³¹ Fried, *supra* note 24; Wertheimer, *supra* note 26.

³² Nozick, *supra* note 25; Feinberg, *supra* note 25.

³³ Trebilcock, *supra* note 1 at 80.

³⁴ *Ibid.* at 78.

³⁵ *Ibid.* at 93 and 95.

in the common law of contracts in two-party disputes should be situational monopolies that arise out of the particular circumstances surrounding specific exchanges,³⁶ and would apparently grant relief only in a situational monopoly and only if the situational monopolist extracted much more than the competitive value of the good or service.

This approach is appealing because it captures many of our intuitions about which contracts should be enforced while making room for some of the insights of the economic analysis of law. It plausibly solves the question of why the contracts in cases A (the Armed Robber) and C (the Foundering Ship) should not be enforced, while those in E (the Penny Black) and F (the competitive grocer) should. But the distinction between situational and structural monopolies does not seem to capture what really constrains the parties in some of the other cases. For instance, Trebilcock would have to enforce the rice merchant's contract with the Starving Peasant, who faces neither a monopoly nor a non-competitive price. Further, Trebilcock's suggestion of remitting the problem of structural monopolies to public law (anti-trust) does not assist the Starving Peasant; what seems problematic about his situation is certainly that his range of choice has been restricted, but it is precisely through the operation of private ordering that this restriction has come about. Assuming that the Starving Peasant's situation is properly described as one of unfreedom, and that we should do something about it, Trebilcock's approach does not seem helpful.³⁷

On the other side of the coin, Trebilcock would apparently have to enforce the Altruistic Robber's contract; while the robber is a situational monopolist, the "quid pro quo" extracted is more than reasonable in market terms, and therefore the victim's situation does not meet Trebilcock's second requirement for relief. Yet, what seems to be morally relevant about this interaction is not the price or some other economic variable, but the Robber's threat to use force against the victim.³⁸

³⁶ *Ibid.* at 101.

³⁷ I should add that I agree with Trebilcock's conclusion regarding non-monopolized necessity, that contract law is not always an appropriate "vehicle for achieving our distributive justice goals relative to the tax and transfer system": *ibid.* My concern is that Trebilcock's framework, by focussing on competitive market outcomes as the ultimate measure of freedom, appears to miss the real unfreedom in the Starving Peasant's situation, treating it as a welfare problem only. See "Freedom of Choice" *supra* note 2 at 276-79; A.K. Sen, *Inequality Rexamined* (Cambridge, Mass.: Harvard University Press, 1992) c. 2 and c. 4.

³⁸ In his Rejoinder, Trebilcock describes the Altruistic Robber as "quaint and other-worldly," but see *Stott v. Merit Investment Corp.* (1988), 48 D.L.R. (4th) 288 (C.A.), rev'g (1985), 33 A.C.W.S. (2d) 403 (Ont. H.C.J.). Stott was a salesman for Merit in 1979-80, a time of large fluctuations in the

Second, Trebilcock's attempt to avoid as far as possible a moralized baseline fails. Recall that Trebilcock's objections to theories that moralize the baseline is that they out all the interesting work outside the law of contract. But there are two ways in which Trebilcock, too, pushes much of the "interesting theoretical work" outside his own framework. He recognizes the first; speaking of the Lecherous Millionaire and related cases involving sexual proposals, he says:

[I]t seems to me to be difficult to avoid a moral base-line (rights-theory) approach if we are to give effect to the moral intuition that most of us are likely to feel about these cases. [This] ... appears to implicate issues similar to those canvassed in Chapter 2 ["Commodification"], where to enforce transactions in these circumstances is likely to violate basic notions of human dignity and self-respect.³⁹

Trebilcock is quite right to raise the question of commodification, but to refuse to enforce the contract on these grounds points away from questions of coercion, consent, and voluntariness. If sexuality is not to be a commodity, then it really doesn't matter how eagerly or reluctantly the desperate mother enters into the agreement with the Lecherous Millionaire; coercion is beside the point.

Trebilcock shares with other economists his reluctance to recognize the second way in which his theory is moralized. Recall that Trebilcock's theory has two branches. First, there must be a situational monopoly; second, the consideration flowing from β to α must be unjustified by "the normal competitive environment."⁴⁰ α 's proposal to β is, then, being assessed from a competitive baseline; even in a situational monopoly, where β has "no choice," Trebilcock's theory would not give β relief if the consideration extracted by α is no greater than the competitive value of α 's service. The competitive baseline can, at least in principle, be derived empirically; but to use it as a reference point for assessing coercion is to endow it with normative significance. The competitive market price functions in Trebilcock's account not just as a measure of the substantive fairness of the bargain, but as a

price of gold. One of Stott's customers lost a substantial sum and apparently could not pay. According to industry practice, Stott was expected to cover the loss. Stott signed an acknowledgment of his indebtedness to Merit, under circumstances which the Court of Appeal held amounted to duress. Merit threatened to dismiss Stott if he did not sign the agreement, but promised him that "if he did sign, the company would hold him in high esteem and would open a trading account for him and in effect, that he would never, in the result, be called on to pay a cent." This proposal, though not amounting to an independent crime or tort as in the Altruistic Robber, has the same structure: Stott would receive a benefit if he complied and would be subject to wrongful action if he did not comply. (The Court of Appeal went on to hold that though the agreement was voidable, Stott had affirmed it by his subsequent conduct.)

³⁹ Trebilcock, *supra* note 1 at 91.

⁴⁰ *Ibid.* at 101.

determinant of the voluntariness of the transaction. Because Trebilcock makes the competitive outcome the reference point, his theory must ultimately require values of freedom and autonomy to yield to welfarist values.

I have argued elsewhere that the best account of coercion for the purposes of contract law is one which holds that β 's act or promise was obtained by coercion only if α 's proposal contained a threat to do a legal wrong to β .⁴¹ The "legal baseline" approach has the advantage of recognizing and protecting the intrinsic value of freedom in a sphere which is particularly suited to it, while at the same time leaving open other grounds for refusing to enforce contracts. But the legal baseline approach also has a coherence that seems to be lacking in economic approaches. Trebilcock's theory of coercion requires enforcement of the Altruistic Robber's contract. But this enforcement seems to put the law in the contradictory position of simultaneously affirming and denying the rightfulness of the Robber's conduct. On the one hand, by refusing to recognize the victim's plea of coercion and by enforcing the Robber's claim to enforcement of the contract, the law says that the Robber's claim was rightful; on the other hand, the law is certainly going to regard the Robber's conduct as both criminal and tortious, and as such wrongful. At a minimum, it seems to me that a theory of coercion in contract must deny enforcement of agreements obtained through the doing of a legal wrong; the weakness in economic approaches, Trebilcock's among them, is that they draw attention away from the contracting parties as agents and toward the consequences for society at large of enforcement.⁴² However important these consequences may be, they seem to have little bearing on the voluntariness of the particular transaction.

⁴¹ Stewart, *supra* note 23.

⁴² This weakness can be seen in a case that Trebilcock offers to cast doubt on my minimal requirement of a legal wrong. Consider the case of a slave "who holds up his owner at gunpoint one night and demands his freedom." Trebilcock suggests that despite the wrongfulness of the slave's threat, "we might well wish to enforce this agreement," because slavery is itself unjust: *supra* note 1 at 85. This example seems to me to shed little light on the problem of coercion in the law of contract. On the one hand, it is inconceivable that a court in a jurisdiction that recognized slavery would uphold the agreement; on the other hand, the slave's action would *not be wrongful* in a jurisdiction where slavery itself was illegal. In other words, the reasons that "we" would offer for or against upholding the agreement have nothing to do with the nature of the interaction between the master and the slave, but everything to do with "our" view of slavery. For some of the legal perplexities created by the institution of slavery, see M. Tushnet, *The American Law of Slavery, 1810-1860* (Princeton: Princeton University Press, 1981).

IV. CONCLUSION

It may well be that private ordering, with freedom of contract as one of its main elements, is a valuable instrument in the pursuit of both welfare and autonomy. But goods that are instrumentally valuable must be valuable for someone; there must be, underlying the law of contract, a purposive, autonomous agent who is more than just a site for utility or even for a range of choices. The weakness of Trebilcock's account of commodification is that it assumes what has to be proven: that it is appropriate to commodify everything. The only arguments against commodification that Trebilcock considers are purely instrumental ones, but the question of commodification must be considered, at least in part, from the perspective of an agent who is not merely instrumental to other agents and who has a capacity to behave non-instrumentally. Similarly, Trebilcock's account of coercion, though it begins with a focus on the range of choice facing the agent, ends with a welfarist baseline that draws attention away from the autonomy of the choosing agent. Trebilcock is right to want to make room for autonomy as well as welfare in his framework, but to really make that room, he must take autonomy even more seriously than he does.

