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Remedies When Contracts Lack Consent: Autonomy and Institutional Competence

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Remedies When Contracts Lack Consent: Autonomy and Institutional Competence

Abstract

Autonomy-based theories hold that enforceable contracts require the knowing and voluntary consent of the parties. In defining "knowing" and "voluntary," however, autonomy theorists have paid little attention to the remedy that will be granted if consent is found to be lacking, or to the question of what obligations (if any) will be enforced in place of the unconsented-to contract. In this paper, I expand on Michael Trebilcock's argument that considerations of institutional competence—specifically, the relative ability of courts and private actors to craft acceptable substitute obligations—should sometimes play a key role in defining what counts as "knowing" and "voluntary" consent.

Keywords

Contracts; Consent (Law); Remedies (Law)

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REMEDIES WHEN CONTRACTS LACK CONSENT: AUTONOMY AND INSTITUTIONAL COMPETENCE®

BY RICHARD CRASWELL*

Autonomy-based theories hold that enforceable contracts require the knowing and voluntary consent of the parties. In defining “knowing” and “voluntary,” however, autonomy theorists have paid little attention to the remedy that will be granted if consent is found to be lacking, or to the question of what obligations (if any) will be enforced in place of the unconsented-to contract. In this paper, I expand on Michael Trebilcock’s argument that considerations of institutional competence—specifically, the relative ability of courts and private actors to craft acceptable substitute obligations—should sometimes play a key role in defining what counts as “knowing” and “voluntary” consent.

Selon la théorie autonomiste, le contrat est exécutoire lorsque les parties contractantes ont sciemment et volontairement donné leur consentement. Toutefois, en définissant les termes «sciemment» et «volontairement», les théoriciens ont peu considéré les recours disponibles dans le cas où le consentement serait absent, ainsi que l’exécution forcée de certaines obligations supplétives, nonobstant ce défaut de consentement. Dans cet article je développe l’argument de Michael Trebilcock selon lequel les questions juridictionnelles—tel que la capacité des tribunaux et des organismes privés de formuler des obligations supplétives au contrat—devraient être considérées dans l’évaluation du caractère «conscient» et «volontaire» du consentement.

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I. INTRODUCTION

Like Michael Trebilcock, I am a law and economics scholar by trade. As a result, I share many of his assumptions about the proper analysis of contract problems. While we do not agree on every point, his views are probably closer to mine than they are to those of the other participants in this panel.

This places me in some difficulty, for this panel is billed as a *critique* of Professor Trebilcock's book, and most of what I want to say is extremely flattering. In addition to presenting a series of (for the most part) sound economic analyses, the book is especially remarkable for the attention it gives to non-economic theories and for the respect with which it treats opposing views. This sort of ecumenicism is, I'm afraid, rather rare among writers on law and economics. Indeed, specialization has made such broad-mindedness rare among academics of any sort, regardless of their philosophical or methodological persuasions.

In keeping with the breadth of Professor Trebilcock's own analysis, I want to talk here about both economic and non-economic theories. In particular, I want to talk a little about a non-economic, autonomy-based theory of contracts, and then discuss the relationship between that theory and Professor Trebilcock's own "pragmatic" focus on considerations of institutional competence.¹ Each of these theories has something different to say about when a person can be said to consent to a contract voluntarily and knowingly. My own view is that these theories can be better understood by focusing on a question familiar to any practicing lawyer: What is the appropriate remedy?

II. AUTONOMY-BASED THEORIES

Autonomy-based theories, as defended by writers such as Charles Fried,² hold that the ability to freely choose one's obligations is an important aspect of political and moral freedom, and that a system of private ordering can therefore be justified without regard to whatever economic efficiencies might be produced by such a system. On this view,

¹ M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge: Harvard University Press, 1993) at 101 [hereinafter *Freedom of Contract*].

² C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge: Harvard University Press, 1981). See also R.E. Barnett, "A Consent Theory of Contract" (1986) 86 Colum. L. Rev. 269, and "The Sound of Silence: Default Rules and Contractual Consent" (1992) 78 Va. L. Rev. 821; and R.A. Epstein, "Unconscionability: A Critical Reappraisal" (1975) 18 J.L. & Econ. 293.

the enforceability of any particular contractual obligation is a moral issue which turns on whether the party allegedly subject to that obligation has truly consented to it. If he did not consent, it would infringe his freedom to enforce the contract against him; while if he did consent, it might be just as much of an infringement not to enforce the contract.³

Significantly, though, not just any form of “consent” will do to bind a party under this theory. Instead, the consent must be *voluntary*, and under most conceptions of autonomy the consent must also be adequately *informed*. For example, if someone signs a contract but does so only because the other party holds a gun to his head, no autonomy theorist would say that the first party had consented in any meaningful way. The same would apply if the first party had been tricked into signing the contract—for example, if the other party had lied about what the contract said. Thus, if enforceability is to turn on the presence or absence of meaningful consent, an autonomy theorist must develop criteria to tell when an apparent instance of consent was not really voluntary or when it was not adequately informed.

One of this book’s contributions is that it canvasses the vast range of problems that must be addressed in any attempt to define “voluntary” (and “informed”) consent. It might seem obvious that a party’s choice is not really voluntary if he is threatened with being shot unless he signs the contract, as in Trebilcock’s “highwayman” example.⁴ But what if the complaining party is a shipowner who, as a result of a natural storm, is threatened with losing his ship unless he signs a contract with the only tug in a position to rescue it (Trebilcock’s “foundering ship” case⁵). Or what if he is an avid collector who is threatened with having to do without a desired stamp unless he agrees to the current owner’s terms (the “penny black” case⁶)? Or what if he is a poor consumer threatened with having to do without some product unless he agrees to the standard form contract used by all sellers in his neighborhood (Trebilcock’s “single mother on welfare” case⁷)? Further variations are possible in most of these cases—for example, the seller

³ See Fried, *ibid.* at 20-21 (arguing that if the law refused to enforce a freely undertaken obligation, it would fail to respect the promisor’s status as a responsible moral agent). For convenience in the use of pronouns, all of my examples will involve a male who wants to get out of a contractual obligation and a female who wants the obligation to be enforced.

⁴ *Freedom of Contract*, *supra* note 1 at 84.

⁵ *Ibid.* at 85.

⁶ *Ibid.* at 87.

⁷ *Ibid.* at 97.

might be a single monopolist or a group of sellers who compete vigorously, and the products might be either frivolous goods or necessities. In the foundering ship case, there might be one ship in jeopardy or several (perhaps more than the tug can save), and the threat might be to the lives of the passengers or merely to the ship's cargo.

The proper analysis of such cases has long been debated by philosophers as well as by lawyers. As Trebilcock discusses, some argue that hard choices make a contract coercive (in a morally objectionable way) only if the alternative to signing the contract would violate some legal or moral *right* of the threatened party. Under this approach, a substantive theory of rights is needed to decide which of these cases is truly coercive.⁸ Others suggest that a contract could be considered coercive if the alternative to signing would leave the threatened party (a) worse off than he would in fact have been left if the contract had not been offered (a "statistical" baseline), regardless of whether he had any right not to be left in that state; or (b) worse off than he subjectively expected to be left if the contract had not been offered (a "phenomenological" baseline), again regardless of whether he had any right not to be left in that state.⁹ Trebilcock's own suggestion, which he offers somewhat tentatively, is to ask whether the only alternative to signing would leave the threatened party worse off than if he had never encountered the other party.¹⁰

In the end, though, Trebilcock is not really concerned with defending any general or overall test for coercion. Instead, he takes a more eclectic approach which treats each example on its own terms, and argues for or against enforceability based on factors which vary from example to example. To be sure, he does suggest some general rules of thumb, such as his recommendation that courts intervene in cases of "situational" monopolies but not in cases of "structural" monopolies.¹¹ In making these recommendations, however, Trebilcock relies very little on his (or any other) theoretical definition of coercion, and quite a bit on what he calls "pragmatic considerations of institutional competence."¹² As he puts it elsewhere in the book, sometimes the most

⁸ For example, R. Nozick, "Coercion" in S. Morganbesser, P. Suppes & M. White, eds., *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's Press, 1969) 440 at 440.

⁹ For more on all three baselines, see A. Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987).

¹⁰ *Freedom of Contract*, *supra* note 1 at 84 (discussing what he terms a "literal Paretian" test).

¹¹ *Ibid.* at 93-95, and 101. I discuss this recommendation below in Part VI.

¹² *Ibid.* at 101.

an analyst should aspire to is “muddling through.”¹³

I agree with Trebilcock’s intuition that the enforceability of many contracts should not turn simply on answers to the questions, *Was the objecting party’s consent voluntary?* and *Was his consent sufficiently informed?* That is, I share Trebilcock’s conclusion that the questions posed by the autonomy-based theory of contracts are not very helpful in deciding on the enforceability of a large class of contracts. However, I think that more can be said about just why these questions are inadequate, and about what questions ought to take their place.¹⁴ In the remainder of these comments, I will attempt to elaborate this point by asking what *remedy* autonomy theorists would recommend for cases where voluntary consent is lacking.

Before turning to the question of remedy, however, a preliminary point must be disposed of. At times in the book, Professor Trebilcock suggests that he may share the basic premise of the autonomy-based theories (*i.e.*, the premise that the enforceability of a contract should normally turn on the voluntariness of the objecting party’s consent). Indeed, Trebilcock even provides what might seem to be a convincing economic justification for this premise. Noting that one economic reason for respecting voluntary exchanges is that they can be presumed to increase each party’s welfare, Trebilcock points out that the presumption of a welfare increase may not be valid if one party entered the transaction involuntarily.¹⁵ If one is concerned about increasing welfare, then, it might seem as though one *must* come up with a suitable definition of “voluntary” in order to determine when we can infer that the parties’ welfare has increased.

As an economic argument, though, this is a *non sequitur*. What is needed to infer welfare increases from a voluntary transaction is not at all the same as what is needed to determine whether a party’s consent is truly voluntary. Consider an example that anyone would define as coercive: the case of a seller who says “sign this contract or I’ll shoot.” When the victim responds by signing the contract, an economist can still make the usual inference that signing the contract increased the victim’s

¹³ *Ibid.* at 126.

¹⁴ My own views are set forth at more length in R. Craswell, “Property Rules and Liability Rules in Unconscionability and Related Doctrines” (1993) 60 U. Chi. L. Rev. 1.

¹⁵ *Freedom of Contract*, *supra* note 1 at 17 and 83-84; see also *ibid.* at 103 (applying a similar argument to cases of imperfect information). There are, of course, other possible counterarguments that might be raised against this presumption (see, for example, *ibid.* c. 7, discussing various forms of paternalism)—but these counterarguments are unrelated to the point I am making here.

welfare *relative to the alternatives then available*. After all, the economist's usual inference (*i.e.*, that an observed choice must have increased the chooser's welfare) never asserts anything more than that the chooser's welfare must have increased relative to whatever alternative the chooser in fact faced. The problem in this example, then, is not that this inference is invalid but simply that it is unhelpful. From a normative perspective, we don't really care whether signing the contract increased the chooser's welfare relative to his getting shot. Instead, what we care about from a normative perspective is whether the only alternative then available (getting shot) is the appropriate baseline against which the voluntariness of the choice ought to be assessed. The economist's inference that signing the contract must have been better than getting shot is thus of no help in resolving this issue. In the class of cases under consideration here, the two tasks—defining coercion and inferring increases in welfare—have little to do with one another.

III. THE QUESTION OF REMEDY

I turn now to the question that interests me. Under an autonomy theory of contract, what should be the remedy if a party can show that he did not voluntarily consent to a contract, or if he can show that his consent was not sufficiently informed?

While this question is not often addressed by autonomy theorists, the answer might seem to be obvious. If no person can be held to a contractual obligation to which he did not consent, any contract which was not consented to is a moral nullity, so the contract cannot legitimately be enforced. In other words, when true consent is lacking, the proper remedy (from an autonomy standpoint) might seem to be complete rescission of the offending contract, combined with restitution of any benefits that have changed hands. I will refer to this position as the "remedial corollary" of the autonomy theory. Under this corollary, if a seller has forced a buyer to sign a contract at the point of a gun, then (at a minimum) the buyer should be allowed to return any goods that have been delivered and get his money back.

Of course, any practicing lawyer knows that undoing a transaction is not always feasible. However, there are two different reasons why undoing the transaction may not be an appropriate remedy, and it is worth distinguishing those reasons here. The first reason is practical: literally undoing the transaction may be impossible. The goods may have been consumed, or services may have already been rendered, and in either case it will be impossible to restore the exact

status quo ante. This problem has obvious practical significance for the choice of an appropriate remedy—but it is not the problem I want to focus on here.

The second reason why rescission may not be an appropriate remedy is that in some cases nobody *wants* to undo the transaction, even if it would be possible to do so. That is, while the victim of a gunman may be happy to return the goods and get his money back, other victims may not be so eager to undo their coerced transactions. As this point is less often recognized, it requires some explanation.

Consider a shipowner who has had to pay a huge sum of money to get his ship rescued during a storm. Even if we decide that the owner's choices were so constrained that his agreement was not really voluntary—that is, even if we adopt a philosophical definition of “coercion” which includes this case—this would hardly establish that it would be a good idea to undo the coerced transaction and restore the *status quo ante*. Restoring the *status quo*, in this case, would mean towing the ship back out to sea and placing it in jeopardy once again. This is hardly the kind of “protection” that the shipowner would welcome.

A similar analysis applies in the case of a consumer who faces a monopoly seller, or even a group of competing sellers who all insist on the same standard form contract. In either case, the consumer's only choice is to agree to the sellers' terms or to do without the product in question, so it would certainly be possible to adopt a definition of coercion which treated such a choice as coerced. (Such a definition would of course be controversial, but I am not concerned here with whether that would be the right definition to adopt.) Instead, my point is that *even if* we accept that definition of coercion, this would not establish that we ought to undo the transaction by making the customer return the product and letting him get his money back. As long as all other sellers insist on identical terms, the consumer would be no better off after this remedy than he was before: he would still face the hard choice of accepting other sellers' terms or doing without the product in question. In short, in these cases undoing the transaction is not an appropriate goal *even if we agree that the transaction was “coerced.”*

At this point, it might be objected that there is one sense in which undoing the transaction might indeed be an acceptable goal, even in cases such as these. That is, while the owner of a sinking ship clearly would not want the rescue transaction to be undone *permanently*, he might not mind at all if it were undone *temporarily*. Let us imagine (at least as a thought experiment) returning the parties to the *status quo ante* in which the ship is about to sink and only one tug is in any position to

save it. This would be morally problematic if the ship would then be left to sink, but there is no reason to suppose that would be the result. Instead, what would probably happen is that the tug company—having now learned that exorbitant rescue fees will not be enforced—would offer a more moderate contract, charging a fee sufficient to give it a normal profit but nothing more. (If the tug company does not lower its fee enough, that contract too could be rescinded, and the process could be repeated until the tug company finally gets it right.)

A similar analysis can be applied to the consumer facing sellers who use oppressive and identical standard forms. That is, we can at least imagine a regime in which courts keep voiding any one-sided contracts entered into under these circumstances until, eventually, some seller figures out that the only way to make her deal stand up is to offer more reasonable terms. When viewed from this standpoint, an autonomy theorist could argue that undoing the transaction is an appropriate remedy in every case where consent is coerced—an appropriate remedy in principle, that is, leaving only the mundane practical objections in cases where the goods for some reason cannot be returned.

I believe, however, that there is still an important difference between (a) undoing a transaction in this temporary sense, and (b) undoing the transaction in the more permanent sense that would be appropriate in other cases of coercion. In the two cases just discussed, the objecting party might be happy to have the deal undone temporarily, but he would still want it to be consummated eventually on more favourable terms. As a result, the law's aim in these cases is not to prevent the two parties from transacting at all, but rather to prevent them from transacting *on unjustifiably one-sided terms*. To implement this remedy, therefore, courts will have to be able to determine the point at which the terms have stopped being unjustifiably one-sided. In the sinking ship case, for example, the courts will have to be able to determine a reasonable price for the tug's rescue service. In the consumer example, the courts will have to be able to determine what counts as reasonable warranty terms (or credit terms, or whatever other aspect of the transaction is challenged by the consumer). Absent such a determination, the court would have to keep voiding the contracts forever, since the coercive aspect of the situation—the fact that the only alternative to signing the contract is letting the ship sink or doing without the product in question—will always be present. This would mean that the ship would never get rescued, and the consumer would

never be able to receive the product.¹⁶

This need to evaluate a challenged contract's substantive terms marks an important difference in remedies between these two cases, on the one hand, and the sale induced by a gun, on the other. Specifically, in the gun case the court can set aside the transaction without worrying about whether the contract's substantive terms were impermissibly one-sided. Moreover, it can continue to set aside the transaction (still without regard to the substantive terms) as long as the seller continues to use a gun. The court need not worry that this would permanently block a transaction that in fact would be very useful to the buyer, for if the seller is willing to offer terms that would be useful to the buyer then she can always get the buyer to agree to those terms without using a gun, in which case the transaction would then be upheld. In this example, then—unlike the case of the foundering ship or the monopoly seller—there is no reason for the court *ever* to scrutinize the substantive terms of the transaction.¹⁷

These examples can be generalized by dividing all cases of coercion (or arguable coercion) into two categories. In one category, typified by gun-to-the-head duress, the court can void the coerced transaction without ever attempting to evaluate the substance of the challenged contract. The defining characteristic of this category is that it is within the power of the stronger party to eliminate or correct the conditions that give rise to the coercion (for example, by refraining from using a gun). The fact that the stronger party can eliminate the coercion is what makes it possible for the law to void the transaction without

¹⁶ Strictly speaking, the court could invalidate every rescue contract (regardless of the contract's terms) if it then allowed the rescuer to get paid without a contract, by permitting her to sue in restitution for the reasonable value of her services. However, this still requires a court to determine the reasonable value of her services, just as it would have to do under a rule which struck down all contracts *except* those which charged a reasonable price. While there might perhaps be symbolic distinctions between these regimes, either would place exactly the same institutional demands on the court, so I will not distinguish between them for the purposes of my analysis.

¹⁷ In gun-to-the-head cases, where the transaction cannot be undone for practical reasons—for example, if the goods have already been consumed by the buyer—the court might still have to determine the reasonable value of the goods in order to fix an appropriate remedy in restitution. However, the law can still adopt prospective sanctions to try to deter such coerced contracts *ex ante*, and one way to effect such a sanction is to shade the restitutionary recovery against the offending seller (thus reducing the importance of strictly accurate determinations). But the law cannot take this approach when the involuntariness stems from necessity (the foundering ship case) or irremediable lack of information (consumer credit sales), unless we are willing to deter all rescue contracts or all consumer credit sales. (The law could perhaps impose penalties on all rescue contracts or credit sales *found to contain unreasonable substantive terms*—but this requires the courts to distinguish reasonable from unreasonable substantive terms, thus raising all the issues discussed in the text.)

concern for whether the terms of the transaction might be substantively reasonable (and, thus, without any fear of permanently blocking desirable transactions). As long as it is possible for the stronger party to eliminate the coercion, those parties who want to transact on substantively reasonable terms can do so by eliminating the coercion and then getting the buyer's uncoerced consent.

By contrast, in the second category of cases (typified by the sinking ship example), undoing the transaction without scrutinizing its substantive terms is not an appropriate goal, even in principle. The defining characteristic of this category is that, in these cases, it is *not* possible for the stronger party to eliminate or correct the factors that make the situation coercive. In the sinking ship case, for example, the coercion (if coercion it is) comes from nature, or from the fact that the ship is sinking and there is only one rescuer in sight. If the court were to strike down contracts formed in this setting without regard to their substantive terms, then no contract formed in this setting would ever be enforceable, and the rescuer could never get paid.

IV. REMEDIES WHEN CONSENT IS NOT SUFFICIENTLY INFORMED

My analysis so far has focused on cases of "coercion," of the sort discussed in Chapter Four of Professor Trebilcock's book. However, a similar analysis can also be applied to some of the "asymmetric information" problems discussed in Chapter Five.

Consider first a case of outright fraud, where the seller lies about her product (or about the clauses contained in her standard form). Fraud is wrongful under nearly any philosophical theory, of course, so it might seem obvious that such a contract ought not to be enforced. Moreover, this is also a case where the implicit remedial corollary to the autonomy-based theory seems quite plausible. That is, if one believes that obligations which were not properly consented to have no moral force at all, it seems obvious that a contract induced by fraud should be rescinded and the buyer should be given his money back.

From my point of view, however, what is significant about this case is that (just as in the case involving the gun) it is within the seller's power to cure the conditions that makes the buyer's consent invalid: the seller can simply refrain from fraudulent statements. As a result, a court can invalidate the resulting contract without any fear that it might be permanently blocking a desirable transaction, and therefore without any need to scrutinize the transaction's substantive terms. If the seller thinks

the contract is substantively reasonable, she should be able to go back and get the buyer's consent without engaging in fraud, so any substantively reasonable contract will be blocked temporarily at most.

A somewhat harder question is posed in a case of bare nondisclosure, where the seller never lies about her contract but does bury a clause in the fine print and never tells the buyer it is there. If the buyer signs the contract, then learns of (and objects to) the clause later, should the court void the contract? In particular, should the court void the contract without regard to the substance of the objectionable clause, just as it would if the seller had lied about the clause (or if the seller had forced the buyer to sign at the point of a gun)? An autonomy-based theory view would treat this question as turning on the nature of informed consent. Obviously, this would require some test or criteria for deciding when mere failure to disclose was sufficient to make a party's consent uninformed, and developing such criteria is not easy.¹⁸ Once the relevant criteria were developed, however, the remedial corollary of the autonomy principle would then presumably come into play. That is, if the failure to disclose was not deemed to negate the buyer's informed consent, the contract would of course be fully enforceable, while if the failure to disclose *was* deemed to negate the buyer's informed consent it would seem that the contract would then have to be rescinded.

From my point of view, however, this conclusion that the contract should be rescinded is too quick, even if we assume (at least for the sake of argument) that nondisclosure does indeed prevent the buyer's consent from being adequately informed. On my view, further analysis is needed to decide whether the contract should be rescinded regardless of its substantive terms, as in the case of outright fraud or gun-to-the-head duress; or whether it should instead be rescinded only if its substantive terms are also found to be unreasonable, as in the case of the foundering ship or the monopoly seller. To give a better sense of that further analysis, let me discuss this question at more length.

On the one hand, it might be argued that it is within the seller's power to cure this problem as well. That is, it would certainly have been possible for the seller to point out the clause to the buyer before the buyer signed, thus eliminating any impediment to informed consent. Indeed, if we believe that sellers ought to point out all such clauses to buyers before they sign, then this case probably *should* be treated like a case of outright fraud, and the contract should be struck down without regard to its substantive terms. As long as we believe that sellers ought

¹⁸ Several possible criteria are surveyed by Trebilcock in *Freedom of Contract*, *supra* note 1 at 102-03 and 106-15.

to point out all such clauses, it is not at all unreasonable to ask any seller who thinks her terms are reasonable to get the buyer's informed agreement after she has pointed the terms out to him. On this view, then, the courts should strike down any and all contracts whose terms have not been pointed out, and they can do so without worrying that such a rule might block important transactions.¹⁹

On the other hand, it is not obvious that we want sellers to point out every clause to buyers before they sign. Pointing out clauses takes time, and explaining the significance of the clause (so that the buyer's consent can be truly informed) may take even more time. If the contract is a long one with complicated terms—say, a twenty-page insurance contract²⁰—a full explanation of every clause might take two or three days. Most buyers would not be willing to sit through this long an explanation before buying insurance; and it is probably not socially desirable for them to do so. While it is laudable to be an informed consumer, there are many other laudable things people can do with their time, and it would be a narrow view indeed that placed “becoming informed about insurance contracts” at the very top of this list. More generally, while there might be some kinds of contracts (or some kinds of consumers) for which it was worth taking whatever time was needed for a full explanation, surely there are some kinds of contracts (or some kinds of consumers) where spending this much time is not worthwhile. Thus, even when it is within a seller's *power* to correct the conditions that vitiate buyers' informed consent, if the costs of doing so are high enough then we may not want to induce this kind of correction.

Significantly, whenever we decide we do not want sellers to fully explain every clause, the problem then begins to look like the second category of cases discussed earlier. That is, we can still decide that a buyer has not truly consented to any clause which was not fully explained to him—this will depend on our philosophical theory of informed consent—but we now have to recognize that, even if informed consent is lacking, it is a lack that cannot (or, at least, should not) be corrected by the seller. As a consequence, we can no longer argue that the law should strike down *every* contract where such consent is lacking, in order to

¹⁹ A range of remedies is in fact possible here, for the court could (a) strike down the entire contract; (b) enforce the contract but strike out the objectionable clause; or (c) enforce the contract but replace the objectionable clause with something more favourable to the buyer. While a good deal could be said about the choice among these three remedial approaches, the main point (from an economic perspective) is that the remedy chosen be sufficiently unfavourable to deter sellers from engaging in such conduct.

²⁰ See, for example, the contract involved in *Gerhardt v. Continental Insurance Co.*, 48 N.J. 291, 225 A.2d 328 (1966).

induce the seller to cure the problem by making the buyer more informed. Such a rule would either induce the very explanations we are trying not to induce (*i.e.*, two days of explanations), or—if sellers decided not to provide the two days of explanation anyway—it would invalidate every clause in every form contract, thus preventing many buyers and sellers from ever transacting. If the law is to protect buyers in this case, therefore, the most it can do is invalidate any *substantively unreasonable* clauses which have not been explained to the buyer, while permitting the seller to enforce clauses whose substance seems reasonable. Just as, in the sinking ship case, the court had to allow the collection of a reasonable price even when the shipowner's agreement was arguably coerced, so in this case the court must allow the enforcement of reasonable terms even when the buyer's agreement was arguably uninformed.

In short, from a remedial standpoint there are two relevant categories of potential information problems, just as there were two relevant categories of coercion. In the first, the problem can and should be cured by the seller, so courts can strike down the resulting contract without regard to its substance. In the second category, either the problem cannot be cured at all (for example, nobody knows the information in question), or the problem can be cured but only at a cost that is not worth incurring, so it is a problem which (all things considered) should not be cured. When a case falls in this category, the law cannot strike down the contract without regard to the substance of its terms, but can at most strike down those contracts whose substance is unreasonable.

V. THE ROLE OF INSTITUTIONAL COMPETENCE

By "institutional competence," I mean the competence of courts (or of any other institution) to evaluate the substance of a transaction in an effort to decide whether its substantive terms are reasonable. Obviously, this competence can only be judged relative to some standard of substantive reasonableness, and I will not try to provide such a standard here.²¹ Whatever standard one adopts, though—be it efficiency, a "just price" theory, or any other approach—it is surely possible for courts to do either well or poorly at applying that standard to the facts of any particular case. My thesis is that the ability of courts

²¹ For a survey of possible standards, see Craswell, *supra* note 14 at 20-34. See also *Freedom of Contract*, *supra* note 1 at 120.

to apply such a standard well is crucial in deciding whether courts should refuse to enforce contracts which fall into the second category of cases discussed above. In particular, if courts cannot apply the substantive standard very well, courts should enforce such contracts without trying to evaluate their substance, *in spite of* the fact that the objecting party may not have truly consented to the resulting obligation. In other words, in this class of cases considerations of institutional competence should trump concerns about the validity of the objecting party's consent.

A. *Institutional Competence and the Choice of Remedy*

The reason why institutional competence is relevant only in the second category of cases should by now be obvious. In the first category of cases—cases of fraud, duress, *etc.*, where sellers can and should correct whatever problem it is that invalidates the buyer's consent—I have argued that courts should refuse to enforce unconsented-to contracts without regard to the contracts' substantive terms. Clearly, then, courts' ability to evaluate the contracts' substantive terms will be irrelevant in this first category of cases.

In the second category of cases, though—the sinking ship, the monopoly seller, and (arguably) the standard form contract, where it is impractical to expect the seller to correct the conditions that invalidates the buyer's consent—I have argued that courts should refuse to enforce the contract only if the substantive terms are unreasonable. In this category, courts' ability to perform such a substantive evaluation is critical to any decision about the appropriate remedy. In particular, if the terms courts select as substantively reasonable are likely to be worse than the terms selected by sellers would have been (according to whatever standard of reasonableness we have adopted), then the system will work better if courts simply enforce the contracts as written. Thus, there can easily be some set of cases where courts should enforce a contract *notwithstanding* the fact that the objecting party did not meaningfully consent.

For example, consider the case of a poor consumer buying a necessary product (food or clothing) from a monopoly seller. In such a case, the consumer's only alternative to agreeing to the monopolist's terms is to do without the product in question, and let us assume we hold a philosophical theory of coercion which treats this choice as essentially involuntary. Suppose, however, that the monopoly cannot practicably be eliminated—say, because it is a natural monopoly, or because breaking up the monopoly would cause even worse problems for antitrust or

patent policy. In other words, suppose the case falls into my second category, where no one would suggest that we strike down *every* contract offered by the monopolist (as that would prevent the monopolist and the consumer from transacting at all). Finally, suppose that the only term anyone objects to is the price of the product. That is, suppose the monopolist offers warranties and other terms which everyone would concede are reasonable, but that she takes advantage of her monopoly position to charge an extremely high price.²²

What this means is that, if courts are going to evaluate the substance of the monopolist's terms, they must take on the functions of a price regulator. It is well-known, however, that deciding what price a monopolist should charge is far from easy. In the case of many monopolies (telephone service, electricity, *etc.*), specialized agencies are established to regulate the monopolist's price. These agencies usually have staffs of economists and accountants to evaluate the monopolist's costs, as well as elaborate fact finding procedures to gather the necessary data—yet even these agencies are often unsuccessful.²³ If it is this hard for specialized agencies to determine a reasonable price, the task is likely to be even harder for a common-law court.

Of course, even if we admit that courts will not be particularly good at this task, this by itself does not establish that it would be better for courts not to try. The key question here is one of *relative* institutional competence: How good will courts' decisions be compared with the decisions that would emerge if courts didn't even try to regulate prices? In other words, how good are the prices likely to be set by courts, compared to the prices likely to be set by an unregulated monopolist?²⁴ The inefficiencies of unconstrained monopoly pricing are well-known to economists, so it is conceivable that courts—imperfect as they are—might still do a better job than the unregulated market. (My own guess is to the contrary, as the record of specialized agencies is not one that inspires confidence.) My only point here is that it is exactly this sort

²² As I discuss below, most of the relevant considerations would be the same if the monopolist's non-price terms (warranties, creditors' remedies, *etc.*) were what buyers objected to.

²³ See, generally, P.L. Joskow & R.C. Noll, "Regulation in Theory and Practice: An Overview" in G. Fromm, ed., *Studies in Public Regulation* (Cambridge, Mass.: MIT Press, 1981) 1 at 1; and G.J. Stigler, *The Citizen and the State: Essays on Regulation* (Chicago: University of Chicago Press, 1975) c. 5.

²⁴ Of course, a third alternative is to set up a specialized regulatory commission. But if no such commission has yet been established for any given monopolist, it will be beyond the power of any court to create such a commission, so the court's choice will effectively be limited to (a) attempting to regulate the monopolist's price itself, or (b) enforcing the monopolist's contract without regard to the price charged.

of judgment—*i.e.*, an empirical judgment about relative institutional competence—that is required to decide whether judicial scrutiny of the substance of the monopolist's contract is superior to simply enforcing the contract as written.

A similar analysis can be applied to cases where the objection is to some non-price term—say, the warranty the seller offers,²⁵ or the remedies the seller reserves if the buyer defaults on a credit sale.²⁶ As Trebilcock notes, objectionable clauses of this sort are more likely to result from imperfect information than from monopoly power,²⁷ but this does not alter the analysis significantly. For example, suppose that all sellers of a certain good use fine-print contracts which buyers (rationally) do not read—and suppose that we have decided that buyers' consent to the resulting contract cannot be considered truly informed, under our best philosophical theory of informed consent. Suppose, however, that we have also decided that it is not worth it to spend the time that would be necessary to cure this problem by explaining every contract term to buyers. As discussed above, this conclusion eliminates the possibility of striking down every unexplained term, for that would effectively prevent these sellers and buyers from entering into any enforceable contract whatsoever. Instead, the best courts can do (if they are to strike down any contracts at all) is to prevent the sellers from enforcing substantively *unreasonable* terms that have not been explained to buyers, while still allowing enforcement of any fine-print terms that pass a substantive reasonableness test.

It might seem that evaluating non-price terms, such as warranties or penalties for breach, would be easier than trying to evaluate the price a seller charges. In my view, though, regulating a seller's non-price terms raises difficulties at least as great as those raised by any attempt to regulate a seller's prices. To begin with, any term that favours sellers over buyers should have the effect of reducing the seller's costs (or increasing the seller's revenue), thus holding down the price the seller must charge. To turn this point around, if a court invalidates such a clause then the seller's costs will go up (or her revenues will go down) and buyers will eventually have to pay a higher price. Thus, part of the reasonableness determination—under just about any theory of substantive reasonableness—will require the court to estimate the extent of the likely price increase, and to balance the gains buyers get from

²⁵ For example, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

²⁶ For example, *Williams v. Walker-Thomas Furniture*, 350 F.2d 445 (D.C. Cir. 1965).

²⁷ *Freedom of Contract*, *supra* note 1 at 119.

having the clause removed against the harm buyers suffer from having to pay a higher price.

Moreover, balancing the benefits of removing the clause against the costs of a higher price is a task fraught with complications. If eliminating the clause creates more efficient incentives for sellers—for example, if eliminating a warranty disclaimer gives the seller an incentive to spend more on quality-control to reduce the rate of product failure—the seller's costs will not increase as much as might otherwise be anticipated, and the price increase will be correspondingly reduced. However, altering the contract terms can also alter the *buyers'* incentives—for example, extending the warranty might lead buyers to take less care in maintaining the product, thus causing the price increase to be larger than might otherwise have been expected (as well as requiring more careful buyers to pay for the costs imposed by the less careful).²⁸ Obviously, evaluating these sometimes conflicting effects will not be easy. And the net benefits of most clauses will also depend on buyers' degree of risk aversion—*i.e.*, how much would buyers be willing to pay up front to be protected from the consequences that a one-sided clause might occasionally trigger? This, too, will usually be difficult to assess.

To be sure, the fact that these tasks are difficult does not imply they should never be attempted. As before, the key question is one of *relative* institutional competence: Will the non-price terms selected by courts be better or worse than the non-price terms likely to be selected by sellers, given that the sellers will be constrained only by whatever incentives the market provides? If consumers are not aware of the clauses in question, market incentives to offer efficient clauses may be relatively weak,²⁹ so it is at least possible that courts might be able to do a better job than the market would. My point is simply that it is this relative institutional judgment—and not a philosophical theory of voluntariness—that ought to determine whether courts should even attempt this task. If judicial attempts to set reasonable terms for sellers would end up making matters even worse—for example, if such attempts would end up pricing too many consumers out of the market—then

²⁸ For a discussion of this aspect of warranties, see G.L. Priest, "A Theory of the Consumer Product Warranty" (1981) 90 Yale L.J. 1297.

²⁹ For a formal model, see M. Spence, "Consumer Misperceptions, Product Failure and Producer Liability" (1977) 44 Rev. Econ. Stud. 561. Accessible, non-technical discussions can be found in D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Md. L. Rev. 563 at 599-604; V.P. Goldberg, "Institutional Change and the Quasi-Invisible Hand" (1974) 17 J. L. & Econ. 461.

courts should enforce the sellers' contracts as written in spite of the fact that (by hypothesis) the buyers' consent was not informed or voluntary.

B. *Institutional Competence in Trebilcock's Analysis*

I believe this judgment about institutional competence is what drives most of Professor Trebilcock's conclusions about the particular examples he discusses. Sometimes this is quite explicit, as when he concludes that courts should feel relatively free to step in when there is an easy benchmark to use in assessing the reasonableness of clauses (for example, if we can see what kind of clause is chosen by well-informed consumers in a closely related market), but should defer to regulatory or legislative solutions if no such benchmark is available.³⁰ At other times, Trebilcock suggests that he is relying on values or principles other than a judgment of relative institutional competence. However, I find these suggestions unpersuasive—or, perhaps more accurately, I find them persuasive only to the extent that even they rest ultimately on institutional competence concerns.

For example, one of Trebilcock's suggestions is that courts distinguish between "situational monopolies," where the monopoly is the temporary result of chance circumstances, and "structural monopolies," where the monopoly is likely to be long-lasting.³¹ The foundering ship case, where there happens to be only a single tug in a position to rescue the ship, is a situational monopoly. Examples of structural monopolies include natural monopolies, where economies of scale require that the good or service be provided by a single firm; or cases where the owner of unique skills (Michael Jordan) or of a unique asset (the Penny Black stamp) is in a more-or-less permanent position to earn a supracompetitive return. Trebilcock argues that courts should set aside prices they feel are excessive in cases of situational monopoly, especially when there is a convenient reference price for the courts to use as a substantive benchmark.³² However, he also believes that courts should enforce the monopolist's contract as written (or should defer to specialized regulatory bodies) when the monopoly is structural.³³

Part of Professor Trebilcock's rationale for this conclusion rests

³⁰ *Freedom of Contract*, *supra* note 1 at 120 and note 35.

³¹ *Ibid.* at 93-96.

³² *Ibid.* at 93-94.

³³ *Ibid.* at 95-96 and 101.

on the fact that a structural monopolist's power arises from a market structure which "is exogenous to and precedes the particular circumstances of the interaction between parties to a given exchange."³⁴ In Trebilcock's view, the focus of a theory of coercion in contract law should "arguably" be limited to factors related to the particular interaction between the two parties.³⁵ He thus describes structural monopolies as a form of *market* failure rather than a form of *contracting* failure, and argues that only the latter should be dealt with by private contract law.³⁶ In what seems to be a related argument, Trebilcock notes that if structural monopolies are objected to on efficiency grounds (as distinct from the possible distributive objections), the objection is that the monopoly price will price some consumers out of the market. He then points out that this loss is felt by people other than the two parties to the disputed contract.³⁷ This suggests—although Trebilcock never explicitly says so—that these losses, too, are not the proper concern of a theory of contracts.

If this argument for the distinction between structural and situational monopolies is meant as a free-standing argument, I do not find it convincing. Even accepting Professor Trebilcock's characterization of the efficiency objection to structural monopolies, there are perfectly valid nonefficiency objections which can be made to the distributive effects of structural monopolies (*i.e.*, the high price redistributes wealth from customers to the monopolist).³⁸ These distributive effects clearly are felt by the parties to the contract, and thus would be within even Trebilcock's conception of the proper focus of a theory of contracts. Moreover, it is hard to see why, as a matter of principle, a theory of contracts should be limited to effects felt by the two parties to the contract being examined. Indeed, Trebilcock himself does not follow this narrow view of contracts in any systematic way. When evaluating compulsory disclosure laws, for example, Trebilcock is quite prepared to consider the effect a disclosure law would have on the incentive of all similarly-situated parties to gather information in the

³⁴ *Ibid.* at 95.

³⁵ *Ibid.*

³⁶ *Ibid.* at 101.

³⁷ *Ibid.* at 92.

³⁸ The history of these distributional objections is nicely reviewed in R.H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged" (1982) 34 *Hastings L.J.* 65.

future.³⁹ But if these effects beyond the immediate parties to a contract can properly be considered, why not also consider the third-party efficiency consequences of a structural monopolist's price?

Perhaps for these reasons, Trebilcock ultimately grounds his distinction between structural and situational monopolies on the "pragmatic considerations of relative institutional competence"⁴⁰ to which I alluded earlier. In Trebilcock's view, the telling argument is that the procedures established for litigating two-party disputes do not equip courts to gather the information needed to determine the price that a situational monopolist should be allowed to charge, so such matters are best left to more specialized regulatory bodies.⁴¹ In the case of situational monopolies, like the tug in a position to rescue the foundering ship, Trebilcock argues that specialized regulatory bodies are unlikely to be established,⁴² thus making the argument for judicial intervention somewhat stronger.

This seems to me to be a much sounder basis on which to rest the distinction between situational and structural monopolies. To be sure, an analysis of institutional competence will not necessarily support the exact distinction for which Trebilcock argues: I can imagine structural cases where courts might be quite capable of intervening and situational cases where it might be rather more difficult. For example, consider Trebilcock's argument that, in cases of situational monopolies such as the foundering ship case, courts can look to the reference price charged under normal conditions as a guide to the price that is substantively reasonable. But reference prices may also be available in structural monopoly cases—for example, if there were only one tug company conducting normal operations in a given port because of the small size of the market, or because of a shortage of trained pilots. In such a case, the court might still be able to use the prices charged by other tug companies in more competitive ports as a reference to determine a reasonable price for the monopoly tug company to charge. Due allowance would have to

³⁹ *Freedom of Contract*, *supra* note 1 at 106-15 (discussing A.T. Kronman, "Mistake, Disclosure, Information, and the Law of Contracts" (1978) 7 J. Legal Stud. 1). Compare P. Benson, "Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory" (1989) 10 Cardozo L. Rev. 1077 at 1129-33 (objecting to the fact that Kronman's analysis requires assessing the effect of a legal rule on all transactions, not just on the particular transaction being litigated).

⁴⁰ *Freedom of Contract*, *ibid.* at 101.

⁴¹ *Ibid.*

⁴² *Ibid.* at 95 ("situational monopolies, precisely because they are so time, place, and party specific, are unlikely to attract the attention of institutions concerned with more enduring forms of structural market power").

be made for any differences between the two ports, of course—but allowance for differences must also be made in many situational monopoly cases. In the foundering ship case, for example, evidence establishing the market price for normal tug services might not be sufficient to let the court determine an appropriate price for rescue services supplied during an unusually violent hurricane. It is not obvious that calculating the appropriate adjustment is systematically harder for the structural monopoly than it is for the situational monopoly.

A similar point can be made about Trebilcock's suggestion that, if no convenient reference price is available, the court may be able to determine a reasonable price for a situational monopolist by measuring the situational monopolist's costs, and allowing her to cover her costs plus a normal profit margin.⁴³ While this might indeed be a sensible strategy in a situational monopoly case, the same strategy could also be used in a structural monopoly case (for example, the tug company with a natural monopoly over normal operations in a given harbor). In these cases, the key to the institutional competence issue is the ease or the difficulty the court would face in establishing the tug company's costs and determining a normal rate of profit. This difficulty is not affected by whether the tug company's monopoly is situational or structural.

In short, my own sense is that close attention to institutional competence would support a much more finely-drawn distinction than Professor Trebilcock's rough line between situational and structural monopolies. But this is a point on which reasonable minds may differ, especially once the difficulty of administering finely-drawn lines is taken into account. My main point is simply that this judgment about institutional competence is just what ought to determine the appropriate legal remedy in the category of cases I have been discussing here. In this respect, Professor Trebilcock and I are in complete agreement.

VI. POSSIBLE DEONTOLOGICAL OBJECTIONS

At this point, a summary is in order. On the view I have presented, questions about the nature of the objecting party's consent will not even have to be asked in one subset of cases, as those questions will become moot once the choice of remedies has been addressed. For example, if courts are not well-suited to evaluate a monopolist's prices or a credit seller's standard-form terms, I argued that courts should enforce those contracts *even if* the best philosophical theory of consent would tell

⁴³ *Ibid.* at 94.

us that the buyer's consent was not really voluntary, or was not sufficiently informed. In these cases, then, it is unnecessary to worry about whether the buyer's consent was voluntary.

It might be argued, though, that my position passes too quickly over the moral arguments that undergird the autonomy-based theory of contracts. After all, the fact that it might be better (from some instrumental standpoint) if courts were to enforce certain contracts does not by itself establish that enforcement is morally justifiable. A key premise of autonomy-based theories is that it is unjust to hold a party to a contractual obligation to which he did not consent. Someone who holds this position strongly enough might simply deny the permissibility of enforcing contracts which had not been consented to, even if that position would require courts to take on a task they were not well-suited to perform. Institutional incompetence would of course be unfortunate, such a person might argue, but the merely instrumental costs of incompetent performance cannot (on this view) justify holding someone to an obligation to which he never consented.

One possible response to this argument is to suggest that unconsented-to obligations could be relabelled and enforced as something other than "contractual" obligations. After all, even the strongest backers of autonomy-based theories recognize that there are other bases for civil liability which do not require a party's consent (tort law, for example).⁴⁴ If this sort of relabelling would satisfy autonomy theorists, I certainly have no objection to changing the labels.

The autonomy-based argument is more interesting, however, if it is taken as an argument that it would be unjust to enforce such an unconsented-to obligation under any label. That is, while it is true that there are other bases for civil liability besides consent, those other bases are not unlimited or infinitely flexible, and many of the obligations I have been discussing here do not fit easily into any of the standard categories such as tort (*i.e.*, liability for wrongful acts) or restitution (liability for benefits received and unjustly retained). If unconsented-to obligations cannot be justified on any of these noncontractual grounds, and if (by hypothesis) they cannot be justified on the contractual ground of consent, it might be argued that the enforcement of those obligations is morally unjustifiable regardless of any instrumental arguments that might be put forward. This is the deontological objection to which I now turn.

The first point to note is that, if courts are not very good at deciding what clauses are substantively "unreasonable," the costs of

⁴⁴ See Fried, *supra* note 2, c. 5.

judicial errors will fall largely on consumers. In other words, the costs of judicial incompetence may be “merely instrumental,” but those costs will generally be borne by the very parties courts are trying to protect.⁴⁵ To be sure, this assertion is a slight oversimplification, since the exact incidence of costs will depend on a variety of economic factors. The most important complications arise when consumers differ in the value they place on the objectionable clause and/or in their willingness to pay for the product, in which case it is entirely possible for some consumers to gain while others lose.⁴⁶ In general, though, the effect of judicial errors will be to injure at least some of those that judicial scrutiny of contract terms is intended to protect. The particular consumer who litigates may end up better off, of course, but future consumers as a class will pay the price.

Now, an autonomy theorist could argue that this effect is still morally irrelevant. If one believes that justice must be done even though the heavens fall, and if justice forbids enforcing an obligation against someone who has not consented to it, then perhaps courts should not enforce such obligations *even if* non-enforcement is likely to make the objecting parties as a class worse off in material terms. Still, I would argue that this notion of justice is not an appropriate one to apply to questions of contract enforceability. Here, too, I think the problem is that too little attention has been paid to the remedy courts must use when consent is found to be lacking.

An example may help illustrate my claim. We all agree (I assume) that robbery is immoral, and that it would normally be unjust to force a property-owner to yield up his property to the robber. This premise, too, can be cast in autonomy terms: the property-owner has not consented to the transfer of his property, so such a transfer should not be enforced. It hardly follows, however, that any procedure designed to remedy such robberies is *ipso facto* morally permissible. Still less does it follow that any procedure designed to remedy robbery is morally *required*, to the extent that it would be illegitimate for the state not to adopt that procedure. Suppose, for example, that we could create a special SWAT team capable of dropping 200 pounds of explosives on any robber *while the robbery is in progress* (thus destroying the victim as well

⁴⁵ This is the “double bind” referred to by Trebilcock in *Freedom of Contract*, *supra* note 1 at 98 and 100 (citing M.J. Radin, “Market-Inalienability” (1987) 100 Harv. L. Rev. 1849).

⁴⁶ R. Craswell, “Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships” (1991) 43 Stan. L. Rev. 361 at 372-84. Notice, though, that the effect on consumers does *not* depend simply on how much of the sellers’ costs are passed on in the form of higher prices, or on the slope of the supply and demand curves: see *ibid.* at 383.

as the robber). I think all would concede this to be a very strange way of protecting victims' autonomy interests. Certainly no one would contend that the autonomy principle entitled victims to the "protection" of such a system, or that it would be morally unjust for the state to refuse to employ the SWAT team's capabilities. In this example, at least, it seems perfectly proper to take account of the "institutional competence" of the available mechanisms before deciding whether to protect autonomy interests in any particular way.

Does it matter that, while future consumers as a class might be hurt by incompetent decisions, the particular consumer who challenges the contract in court could still end up better off? That is, can it be argued that justice requires that *this* consumer's autonomy be respected, regardless of the cost to other consumers in the future? This seems to me to be a difficult position to maintain. Suppose that the SWAT team in my example can use a "slightly smart bomb" which will spare the victim, but will destroy the robber *and five or ten innocent bystanders*. It is difficult to argue that the autonomy interests of the victim are categorically more important than the costs which will be felt by bystanders—especially since those costs entail a rather severe restriction of the bystanders' own autonomy. (Although the effect is less drastic, higher prices paid by future consumers can reduce their autonomy too, especially if it prices them out of the market for essential products. Thus, there are autonomy concerns on both sides of this balance as well.)

A better response for an autonomy theorist might be to distinguish sins of omission from sins of commission. That is, if the state refuses to employ my SWAT team, it may be *failing to protect* robbery victims' autonomy, but at least it would not be affirmatively infringing their autonomy. (The affirmative infringement in this case would come from the robber, not from the state.) By contrast, if the state refuses to set aside unconsented-to contracts, the state—by affirmatively enforcing such a contract—would then be playing an active role in infringing the victim's autonomy. If one believes that actively causing harm is categorically worse than merely failing to prevent harm,⁴⁷ it might still be possible to argue that it is morally illegitimate for the state to enforce contracts if the victim has not properly consented.

On closer analysis, however, even this distinction cannot be

⁴⁷ This distinction has a long (and, of course, controversial) history in moral philosophy. For recent discussions see, for example, S. Scheffler, *The Rejection of Consequentialism* (Oxford: Clarendon Press, 1994); W.S. Quinn, "Actions, Intentions, and Consequences: The Doctrine of Doing and Allowing" (1989) 98 *Phil. Rev.* 287.

sustained. More precisely, it might be sustainable for those categories of coercion where the best remedy is to refuse to enforce all contracts, regardless of their substantive terms, but it cannot be sustained in the other category of cases, where the best remedy is to refuse enforcement only if the contract's substantive terms are unreasonable. Recall the problem: if the coercion cannot practicably be corrected by the seller, a remedy which denied enforcement to all unconsented obligations would effectively make transacting impossible, thus advancing no one's autonomy. If the state limits its role to protecting victims against unreasonable substantive terms, however, this means that the state will then be actively enforcing some obligations: substantively reasonable obligations will be enforced in spite of the absence of meaningful consent. At this point, then, the state is not merely failing to prevent infringements of autonomy but is actively contributing to those infringements, so the analogy to the SWAT team becomes relevant again. That is, if judicial attempts to evaluate substantive terms end up making things worse for the class of parties we are trying to protect, it can no longer be argued that it would be unjust to withhold this sort of "protection."⁴⁸

This suggests that, if an autonomy theorist wishes to argue against the enforcement of unconsented-to contracts, he or she must bite the bullet and argue that the nonenforcement principle should extend even to contracts whose substance is reasonable, and even to cases where the impediments to valid consent cannot practicably be cured. This position would be logically consistent, but it would also be extremely unattractive. As discussed earlier, this position implies that the owner of the foundering ship would not be able to sign *any* enforceable contract, so rescuers could never count on getting paid for their services. And if poverty or lack of education are treated as vitiating informed consent,⁴⁹ this position implies that poor consumers (or poorly-educated ones) would also be unable to sign an enforceable contract. This result would carry the distinction between causing harm and failing to prevent harm to an unacceptable extreme. The effect would be to block parties from signing necessary, perhaps even life-

⁴⁸ Another way to put this point is to note that whatever factors invalidated the buyer's consent to the transaction originally proposed by the sellers will also invalidate the buyer's consent to whatever transaction is substituted by the court. For example, if the buyer's consent to the original contract lacked validity because the only alternative to the contract was to do without vital goods or services, the transaction substituted by the court (with what presumably will be more favourable terms) will be equally unconsented-to, because the buyer's only choice will *still* be to accept the new terms or do without the vital goods or services. See Craswell, *supra* note 14 at 35-38.

⁴⁹ Compare the arguments discussed in *Freedom of Contract*, *supra* note 1 at 97-98.

saving contracts—and to do so in the name of protecting those parties' autonomy.

In practice, of course, few if any theorists would support such an extreme result. In some cases, the "re-labelling" option discussed earlier may prove attractive, thus permitting the creation and enforcement of substantively reasonable obligations under some category other than contract. For example, the rescuing tug company and the seller who provides goods to poor consumers might be allowed to recover a reasonable charge for their services under the name of restitution,⁵⁰ and when the obligation is placed under that name the fact that the other party has not validly consented may seem less troubling. Others may be able to avoid the problem by limiting their definitions of "coercion" to conditions that can and should be cured by the seller—outright fraud, classic duress, *etc.*—thereby eliminating the problem category in which meaningful consent is lacking but reasonable substantive terms must nonetheless be enforced. If one's theory of coercion permits this result, autonomy theories can then coexist quite easily with the institutional competence concerns considered here.⁵¹

VII. CONCLUSION

The preceding discussion is not meant to show that instrumental analyses are always right while deontological ones are always wrong, or that philosophical theories of consent have no place in contract law, or to establish anything else of so global a nature. Such an assertion would not only be wildly out of spirit with Professor Trebilcock's book; it could also be easily challenged. Indeed, the view I have presented here leaves open the possibility that philosophical theories of consent may well have a role to play in those categories where the impediments to valid consent can and should be corrected by the party now seeking enforcement.

Instead, my claims here are more modest. First, any analysis of coercion or informed consent must pay some attention to the remedy to be granted if meaningful consent is found to be lacking. This is true regardless of whether the analysis is consequentialist, nonconsequentialist, or anything else. To assume that contracts which are not truly consented to can simply "not be enforced," without asking what (if anything) will be enforced in their place, is to miss a large part of the complexity of this problem.

⁵⁰ See *supra* note 16.

⁵¹ See, for example, Epstein, *supra* note 2.

Second, any analysis of the proper remedy in cases where consent is lacking must pay some attention to questions of institutional competence. In particular, if courts are to strike down contracts whose terms are substantively unreasonable, while allowing enforcement of reasonable obligations, their ability to distinguish reasonable from unreasonable obligations must be considered. Moreover, competence of this sort must be considered regardless of whether the reasonable obligations are enforced under the label of contract or under some other label such as restitution. Either way, if courts are going to determine what counts as a reasonable price (or a reasonable warranty, or any other term), the extent of courts' ability to do that job must surely have some bearing on the propriety of their attempting it.

