



## Osgoode Hall Law Journal

Volume 33  
Issue 2 *Volume 33, Number 2 (Summer)*  
*Symposium: Michael J. Trebilcock's The Limits of Freedom of Contract*


Article 5

4-1-1995

# The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract

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### Citation Information

Hadfield, Gillian K.. "The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract." *Osgoode Hall Law Journal* 33.2 (1995) : 337-351.  
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# The Dilemma of Choice: A Feminist Perspective on the Limits of Freedom of Contract

## Abstract

In this essay I explore what Michael Trebilcock's work in *The Limits of Freedom of Contract* offers feminists in terms of a resolution or transcendence of the dilemma of choice. Trebilcock's work does not address the deepest feminist concerns about conflicts between autonomy and welfare, but it does shed light on narrower versions of the dilemma, providing an analytical framework for the feminist dilemma of choice and emphasizing the pervasiveness of this problem in contract law. Trebilcock's recommendation that society simultaneously use different institutions to promote different values also has salience for the feminist dilemma of choice.

## Keywords

Trebilcock, M. J.; Liberty of contract; Feminist jurisprudence

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# THE DILEMMA OF CHOICE: A FEMINIST PERSPECTIVE ON *THE LIMITS OF FREEDOM OF CONTRACT*®

BY GILLIAN K. HADFIELD\*

In this essay I explore what Michael Trebilcock's work in *The Limits of Freedom of Contract* offers feminists in terms of a resolution or transcendence of the dilemma of choice. Trebilcock's work does not address the deepest feminist concerns about conflicts between autonomy and welfare, but it does shed light on narrower versions of the dilemma, providing an analytical framework for the feminist dilemma of choice and emphasizing the pervasiveness of this problem in contract law. Trebilcock's recommendation that society simultaneously use different institutions to promote different values also has salience for the feminist dilemma of choice.

Dans cet essai j'examine le travail de Michael Trebilcock intitulé *The Limits of Freedom of Contract* pour voir ce que l'oeuvre présente aux féministes comme la résolution ou la transcendance du dilemme de choix. Le travail de Trebilcock ne souligne pas les préoccupations féministes les plus profondes en ce qui concerne les conflits entre l'autonomie et le bien-être, mais l'oeuvre éclaire des versions plus étroites du dilemme, tout en créant un cadre analytique pour le dilemme de choix féministe et en mettant l'accent sur le caractère pénétrant de ce problème en droit des contrats. La recommandation de Trebilcock, selon laquelle la société se sert simultanément des institutions différentes, est aussi saillante pour le dilemme de choix féministe.

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## I. INTRODUCTION

The concepts that animate Michael Trebilcock's *The Limits of Freedom of Contract* inspire deep ambivalence in feminists. Autonomy, choice, contract, and, above all, the market, raise for feminists difficult conflicts between the drive to overcome the historical subjugation that has deprived women of autonomy and choice on the one hand, and the conviction, on the other, that the institutions of contract law and the market offer predominantly impoverished and ultimately degrading opportunities for choice by women already trapped in patriarchy. Among many feminists there is a suspicion, even a fear, that autonomy and choice through contract and the market are traps that will only further ensnare women in disadvantage and degradation.

Feminists struggle with the dilemma of choice, in part, because of an overarching concern about the paradigm of the "rational economic man" and the atomistic conception of liberal individualism. According to feminist scholar Virginia Held,

[t]o see contractual relations between self-interested or mutually disinterested individuals as constituting a paradigm of human relations is to take a certain historically specific conception of 'economic man' as representative of humanity. And it is, many feminists are beginning to agree, to overlook or to discount in very fundamental ways the experience of women.<sup>1</sup>

Jennifer Nedelsky has argued that "claims about the market as a suitable or even crucial vehicle for the exercise of autonomy proceed without inquiry into what actually makes human autonomy possible."<sup>2</sup> "What makes autonomy possible is not separation, but relationship. ... The collective is a source of autonomy as well as a threat to it."<sup>3</sup> These criticisms of the traditional liberal institutions of choice and concepts of autonomy evidence the deep roots of the dilemma of choice.

In addition to these deeply rooted concerns about choice, however, feminists also struggle with the immediate consequences of choice for women in those settings that may lead to women being directly and materially harmed, as existing imbalances of economic, social, and political power find yet another instrument of expression. In this essay, I want to explore what Michael Trebilcock's work in *The*

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<sup>1</sup> "Non-contractual Society: A Feminist View" in M. Hanen & K. Nelson, eds., *Science, Morality and Feminist Theory* (Calgary: University of Calgary Press, 1987) 111 at 113.

<sup>2</sup> "Property in Potential Life? A Relational Approach to Choosing Legal Categories" (1993) 6 *Can. J. Law & Jur.* 343 at 346.

<sup>3</sup> "Reconceiving Rights as Relationship" (1993) 1 *Rev. Const. Stud.* 1 at 8.

*Limits of Freedom of Contract* might hold out for feminists seeking a way out of this immediate dilemma. In particular, I consider whether Trebilcock's demonstration of the falseness of the claim of convergence between autonomy and welfare made by the defenders of laissez-faire markets and contracting—the claim that autonomy and freedom to contract must be protected because autonomy promotes welfare—sheds light on what can be seen as the converse claim by some feminists—that because autonomy does not promote women's well-being under patriarchy, autonomy need not be protected.<sup>4</sup> Trebilcock's conclusion that autonomy and welfare frequently diverge and therefore should be treated as separate values, possibly pursued simultaneously rather than chosen between, I argue, has salience for feminists and the dilemma of choice. In particular, it holds out the possibility that the dilemma is not so stark as feminists have seen, but rather that feminists too must pursue parallel tracks that seek simultaneously to promote women's autonomy and women's well-being.

## II. THE DIVERGENCE OF AUTONOMY AND WELFARE

*The Limits of Freedom of Contract* is an exploration of two themes. The first is the relationship between autonomy and social welfare in a normative justification for private ordering. In exploring this relationship, Trebilcock asks: does private ordering, the freedom to contract, always promote the autonomy of individuals? Does private ordering always promote social welfare measured in terms of efficiency and/or distributive justice? In pursuing this first theme, Trebilcock has in his sights the powerful and simple claim that animates writers such as Richard Posner and Milton Friedman: the virtue of the market and private ordering is that it simultaneously promotes both autonomy and social welfare. Trebilcock's conclusion is that there are important failures of convergence between autonomy and welfare (broadly construed to include the full set of consequentialist goals).

This conclusion leads to Trebilcock's second question: How do we vindicate the sometimes conflicting demands of autonomy and welfare? Here Trebilcock argues that rather than choosing between

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<sup>4</sup> See, for example, some feminist discussions of prostitution, which conclude that prostitution is unacceptable in an egalitarian society "because prostitution is grounded in the inequality of domination and subjection": C. Pateman "Defending Prostitution: Charges Against Ericsson" in C.R. Sunstein, ed., *Feminism & Political Theory* (Chicago: University of Chicago Press, 1990) 201 at 202. Implicit in a refusal to tolerate prostitution is a decision to override the prostitute's exercise of autonomy.

these values in the design of institutions such as private contract law and public legislation, law should rely on different institutions to vindicate different values. Hence, where private ordering defeats welfare goals, Trebilcock argues that law may continue to endorse the essence of private ordering as a vindication of autonomy values while at the same time promoting welfare through regulation of contract terms, distribution policies, and government investment in human capital, communities, and the means for otherwise private delivery of social services. In pursuing this line, Trebilcock's institutional division of labor departs from the standard fault line economists and law and economics scholars have traditionally drawn between matters of efficiency and equity and the institutional solution they have recommended, namely, leaving efficiency to the market and equity to tax and transfer systems. Trebilcock's work is far more nuanced than this, recognizing much beyond equity and efficiency as normative goals and grappling with the complex ways in which the details of contract law and regulation promote and defeat the attainment of different goals.

Feminist discomfort with, and at times hostility towards, the discourse of contract and the market is multi-layered. At the core, I believe, is a deeply felt concern that market relations, contract relations, reflect an impoverished and destructive vision of human relationships. The market and contracts, it is thought, squeeze out from human interaction qualities of love, care, responsibility, duty, fellowship, and community. When our obligations to one another are defined by contract, it is feared, they are only defined by contract. Moreover, the obligations that arise from contract are limited to those that can be extracted *quid pro quo* from a self-interested separate other. There is the further concern, raised in heightened fashion by the issues of surrogacy, prostitution, and employment, that transactions in the market that involve personal services or the body alienate individuals, women in particular, from their bodies; a contract that permits a man to use a woman's body in exchange for cash leads a woman to view her body as separate from herself and to experience her body as in some sense the equivalent of the cash she holds in her hand. Finally, there is the fundamental concern raised by writers such as Jennifer Nedelsky about the constitutive effect of different forms of legally structured relationships on conceptions of the self and the community.

These forms of the dilemma of choice are subtle and complex; they concern the conflict between the value of freedom and autonomy and the impact, broadly speaking, of the institutions of the market and contract as mechanisms for the expression of freedom and autonomy. They are concerned with the role of these institutions in the constitution

and evolution of who we are as human beings, and as women. These are complex issues of choice that I will not address here, nor are they ones addressed by Trebilcock's work.<sup>5</sup> What I will focus on instead is a narrow version of the dilemma of choice that I believe Trebilcock's analysis helps to clarify. This version of the dilemma is focused strictly on the well-being of a particular woman who faces the possibility of choice and can be stated as follows: if a woman is free to choose to engage in a particular activity, we will promote her sense of autonomy and the extent to which she is actually in control of the direction of her life, but the circumstances of the choice make it likely or even inevitable that the choice she makes will be harmful to her. Choice promotes her autonomy on the one hand but diminishes her welfare on the other.

The dilemma has been posed by feminists in a number of settings. Some feminist critics of surrogacy argue that women who choose to enter into surrogacy agreements will contribute to their own exploitation and the objectification of their reproductive capacities, and will expose themselves to the risk of enormous psychological pain and further exploitation at the hands of the courts in the event that they have a change of heart about going through with the contract.<sup>6</sup> Similar

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<sup>5</sup> I am particularly interested in the idea that contract law has been seen almost exclusively by feminists as a means of cutting off relationships, rather than as a means of building and solidifying relationships. I am also interested in the notion, which I believe is false, that contracts are necessarily the product of self-interested bargaining. In my view, the essence of a contract is agreement, consensus; the source of an agreement may be love, duty, concern, obligation, *etc.* The problem from a feminist perspective arises when the act of agreement and contract is used to infer self-interested bargaining and self-protection and to withdraw the state from any further role in the assessment of obligations or relationships. In the surrogacy setting, for example, the act of agreement to a surrogacy contract is then often used to argue that the contract must be enforced with specific performance: see, for example, R.A. Posner, *Economic Analysis of Law*, 4th ed. (Toronto: Little, Brown, 1992) at 154. In the domestic contracting setting, the act of agreeing to a settlement agreement is used to argue that the state has no further role in protecting the interests of women who have signed such contracts, that the contract represents her protection of her self-interest. See, for example, *Pelech v. Pelech*, [1987] 1 S.C.R. 801.

<sup>6</sup> M.J. Radin, "Market-Inalienability" (1987) 100 Harv. L. Rev. 1849 at 1930:

Whether one analogizes paid surrogacy to sale of sexual services or to baby-selling, the underlying concerns are the same. First, there is the possibility of even further oppression of poor or ignorant women, which must be weighed against a possible step toward their liberation through economic gain from a new alienable entitlement. ... The availability of the surrogacy option could create hard choices for poor women. In the worst case, rich women, even those who are not infertile, might employ poor women to bear children for them. It might be degrading for the surrogate to commodify her gestational services or her baby, but she might find this preferable to her other choices in life.

concerns are raised with respect to prostitution<sup>7</sup> and access to technologies that facilitate sex selection of fetuses.<sup>8</sup> Family law scholars have grappled with the dilemma of choice with respect to mediation and separation agreements in the event of divorce, seeing risks that the empowerment of choice in this setting will only amount to making women the authors of their own oppression in the form of inadequate support arrangements.<sup>9</sup> In the criminal law, feminist legal scholars are debating whether battered women are helped or harmed by mandatory charging policies that take away their power to decide whether to pursue criminal charges against their battering spouses.<sup>10</sup> In each of these cases, the promotion of a woman's capacity for autonomous choice is poised in conflict with the promotion of her well-being.

Trebilcock's careful analysis of the relationship between autonomy and welfare (a term he uses broadly to encompass a wide range of measures of well-being) sheds light on this conflict between autonomy and welfare. To begin with, Trebilcock's work validates the discontinuity between autonomy and welfare, and unifies the feminist critique of the convergence claim with mainstream law and economic analysis. Autonomy, Trebilcock argues, does not always promote well-being, as strong defenders of private ordering have claimed. The consequences of an exercise of autonomy will depend on the opportunities available to an individual,<sup>11</sup> the legal treatment of initial

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<sup>7</sup> *Ibid.* at 1922:

What if sex were fully and openly commodified? ... A change would occur in everyone's discourse about sex, and in particular about women's sexuality. New terms would emerge for particular gradations of market value, and new discussions would be heard of particular abilities or qualities in terms of their market value. ... The open market might render subconscious valuation of women (and perhaps everyone) in sexual dollar value impossible to avoid.

<sup>8</sup> J. Brown, "Sex selection: The ultimate sexist act" *Kinesis* (October 1990) 7:

Sex selection is somewhat of a thorny issue for feminism because it appears to fall within the context of reproductive choice: why shouldn't a woman be able to choose the sex of her baby ... ? ... For [some feminist writers] the answer is to promote awareness that sex selection 'choice' within patriarchy serves only to reinforce patriarchal biases and judgments and is the 'ultimate sexist act'.

<sup>9</sup> See M. Shaffer, "Divorce Mediation: A Feminist Perspective" (1988) 46 *U.T. Fac. L. Rev.* 162; and B. Cossman, "A Matter of Domestic Difference: Domestic Contracts and Gender Equality" (1990) 28 *Osgoode Hall L.J.* 303.

<sup>10</sup> See D.L. Martin & J.E. Mosher, *Unkept Promises: Experiences of Immigrant Women with the Neo-Criminalization of Wife Abuse* (Faculties of Law and Social Work, University of Toronto, 1995) [unpublished].

<sup>11</sup> M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) at 78-101.



consent in light of a change in an individual's assessment of her well-being,<sup>12</sup> and her capacity to identify and pursue results that are in her self-interest.<sup>13</sup> I will consider in turn how each of these disruptions in the relationship between autonomy and welfare relates to feminist concerns about choice.

#### *A. Coercion and the Scope of Choice*

Trebilcock makes the strong point that autonomy and welfare are disjoint through careful consideration of the doctrine of duress in contract law. Here there is a conventional recognition that consent to a transaction may fail to promote welfare when consent is extracted under duress. The difficulty is in defining duress. Is duress limited to paradigmatic threats of the "your money or your life" variety? Or is it also duress for an individual to be forced into certain transactions, such as the sale of a kidney or sexual services, because he or she lacks alternative ways of procuring income? What Trebilcock demonstrates is that theories of autonomy offer no self-referencing definition of duress: we cannot identify duress solely by looking for the presence or absence of "true" consent. Rather, in conventional contract doctrine we judge duress on the basis of a normative assessment of the quality of the choices available. Objections to coerced transactions of the "your money or your life" variety are essentially objections to the moral baseline against which the options granted by the deal are measured. It is not a problem of actual consent that renders extortion repugnant and unenforceable—the robbery victim consents as vigorously as we could imagine to the proffered option of handing over her wallet—but rather the normative judgment that individuals are entitled to be free of threats to their safety. This example demonstrates that we cannot assume that autonomy and private ordering always promote welfare; nor can we assume that failures of welfare in a system of private ordering are due to failures of autonomy. Individual instances of autonomy and choice may still be, and routinely are in the case of conventional duress doctrine in contract law, assessed against a normative criterion that judges whether the options available for choice satisfy some moral standard.

The feminist critique of autonomy with respect, for example, to prostitution or surrogacy, is entirely of a piece with this critique by Trebilcock of conventional claims about the relationship between

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<sup>12</sup> *Ibid.* at 102-46.

<sup>13</sup> *Ibid.* at 147-63.

autonomy and welfare. What distinguishes the conventional doctrine of duress from the feminist argument that a woman's consent to engage in prostitution or surrogacy does not demonstrate that these activities improve her well-being, is where the moral baseline is drawn. Conventional duress doctrine holds individuals to be entitled to physical security of the person and so invalidates choices made when the scope of choice is limited by threats to security of the person. The feminist critique of prostitution or surrogacy holds individuals to be entitled to some minimum level of economic well-being and so invalidates choices made when the scope of choice is limited by economic deprivation. The robbery victim's freedom to choose does not increase her welfare because she was forced to choose between her money and her life; the prostitute or surrogate's freedom to choose does not increase her welfare because she was forced to choose between her body and her economic survival. Trebilcock's analysis of the disjuncture between autonomy and welfare demonstrates for feminists, then, the conventionality and acceptance elsewhere in the law of the claim that it is not enough that a person has consented: she must also have had normatively acceptable options from which to choose. Enforcement of surrogacy contracts, for example, cannot therefore be grounded in the simple assertion that, as an instance of private ordering, surrogacy contracts promote welfare.

### B. *Information Failures*

One particularly fine contribution Trebilcock makes in *The Limits of Freedom of Contract*, from the point of view of a law and economics scholar, is his careful treatment of the relationship between various definitions of efficiency and consent when there is a change in the information or beliefs of one of the parties to a transaction between the time of consent and the time of performance. His contribution on this point also offers some illumination to the feminist dilemma of choice.

Trebilcock begins with the Pareto criterion of efficiency, which judges a transaction to be welfare-improving if it makes both parties to the transaction at least not worse off. This is a simple and relatively non-controversial idea. It is also thought to be the bedrock of private ordering and the normative justification for deference to private ordering: as expressed by Milton Friedman, "[t]he possibility of coordination through voluntary co-operation rests on the elementary—yet frequently denied—proposition that both parties to an economic

transaction benefit from it, *provided the transaction is bi-laterally voluntary and informed.*<sup>14</sup> The difficulty, Trebilcock emphasizes, is in determining when the “informed” criterion is satisfied.<sup>15</sup> He elucidates in this respect what he calls the “Paretian dilemma.” Efforts to avoid enforcement of a contract frequently erupt when a party’s information about the value of the contemplated trade changes. As of the later point in time, that is, *ex post* the contract’s formation, the trade is not Pareto-improving; hence, the effort to withdraw consent. If we focus on this point in time, enforcement of the contract does not promote welfare. But there is a problem with this *ex post* perspective: the system of private ordering relies on the enforcement of contracts and under this perspective there would never be enforcement where there was uncertainty regarding the value of a transaction. This perspective would invalidate basic market institutions such as contracts for insurance and stock market transactions that clearly seem to contribute to welfare. The alternate perspective we may take is an *ex ante* one, judging welfare improvements with reference to what the parties believed was in their best interests at the time they gave their consent, even if those beliefs turn out to be wrong. But this approach then begs the formulation of “informed” consent: when is a belief substantiated enough to qualify as “informed?”

The “Paretian dilemma” exposes a fundamental infirmity in the justification for private ordering. It also illuminates the feminist dilemma of choice insofar as the dilemma stems from concerns about women entering into agreements without a full appreciation of the implications of the agreement for their well-being. (This is a concern about the exercise of choice in the surrogacy setting, for example.) Trebilcock’s Paretian dilemma demonstrates that the feminist dilemma of choice is, again, an instance of a more general difficulty in conventional contracts and that appeals to the problematic nature of “informed consent” by feminists are only superficially antagonistic to conventional contract issues. The superficiality is exposed when we recognize that conventional contract law routinely makes normative judgments about what is adequate consent; again, as in the case of coercion and duress, there is no simple equation between autonomy and welfare. In a sense, the dilemma of choice is blunted because it is so pervasive: feminist concerns about the quality of a woman’s understanding of the implications of consent need not be framed as an

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<sup>14</sup> *Capitalism and Freedom* (Chicago: University of Chicago Press, 1962) at 13.

<sup>15</sup> The problem with the voluntariness criterion is dealt with above.

assault on the concept of autonomy, need not set up a conflict with choice. For choice routinely requires more, the law recognizes, in order to determine when its exercise is to the good and when it is not.

### C. *Cognitive Incapacity and the Problem of Preferences*

A final category of failures in the convergence between autonomy and welfare,<sup>16</sup> in Trebilcock's analysis, arises when individuals are unable to recognize or act upon their own best interest. Here, it seems to me, the feminist dilemma of choice is most sharply, but most narrowly, posed. For here we move into consideration not of episodic failures of autonomy to promote well-being as arise when there are problems of coercion or information failures, but rather of systemic failures of women to make choices that promote their well-being. Feminists have attributed this risk to false consciousness among women and cultural roles for women that prompt them to defer to, or act on the basis of the interests of, others.<sup>17</sup> Such a view of women's capacity for choice thus paints a stark conflict between the promotion of autonomy and the promotion of well-being for women.

Trebilcock deals with this type of conflict in his chapter on paternalism, where he canvasses several views on the justification for paternalism in the law. He considers the argument that individual preferences are so dependent on social features external to the individual—endowments, cultural practices, legal rules, power, *etc.*—that there is no coherent sense in which a person acts autonomously when she acts on these highly contingent, or endogenous, preferences.<sup>18</sup> Some

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<sup>16</sup> These categories are in addition to the conventionally recognized failures due to externalities: see Trebilcock, *supra* note 11 at 58-77.

<sup>17</sup> See, for example, Shaffer, *supra* note 9 at 181, who suggests in the divorce mediation context that “[u]nlike men, women may also have difficulty isolating their own needs from those of their children, making mediation a less effective process for them” and Cossman, *ibid.* at 345, who suggests with respect to separation agreements,

if women's moral specificity is such that they are not motivated by the maximization of their self interest, but rather may, under certain circumstances, consider the interests of others, a fundamental assumption underlying the justification for the enforcement of contracts is undermined. ... This problem is highlighted by domestic contracts which are made in the context of intimate relationships, that is, contracts made between and involving the individuals to whom women feel the strongest sense of responsibility—their families—and thus for whom the sacrificing of self interest is most likely.

<sup>18</sup> Trebilcock considers Cass Sunstein's formulation of this point in particular: see C.R. Sunstein, “Legal Interference with Private Preferences” (1986) 53 U. Chi. L. Rev. 1129; Sunstein, “Disrupting Voluntary Transactions” in J.W. Chapman & J.R. Pennock, eds., *Markets and Justice*

of his analysis captures feminist concerns about the social construction of women's preferences, although other fundamental concerns about the extent to which women are willing and able to act in their own interest fall outside of this framework. In either case, however, what is valuable for feminists in Trebilcock's discussion is not his resolution of the truth of various claims about autonomy or the nature of preferences, but rather the analytical move he makes to resolve the dilemma of conflicts between autonomy and well-being.

Trebilcock transcends the sharp but narrowly conceived conflict between choice and welfare by focusing his analysis on comparative institutional analysis. Suppose autonomy and well-being are in substantial conflict so we cannot place our confidence in private ordering as a means of achieving individual well-being. Do we have reason to believe that collective institutions, which substitute paternalistic decisions about individual well-being for the admittedly flawed conceptions of the individuals themselves, will do a better job of ensuring life patterns that promote individual well-being? Will communal institutions do a better job of recognizing and acting upon the authentic best interests of individuals? Without necessarily accepting Trebilcock's resolution of these questions in favour of private ordering, the nugget of wisdom here for feminists is that the dilemma of choice is too narrowly conceived when it is taken out of the comparative institutional context. Failures in convergence between autonomy and welfare are not in and of themselves sufficient to justify a rejection of private ordering; that must rest on a considered judgment that collective institutions will not expose women to even worse outcomes than they would devise for themselves. The history of women's subjugation to various forms of external authority and their exploitation at the hands of these authorities should be reason enough for feminists to pause over these considerations.

### III. A MULTI-INSTITUTIONAL APPROACH TO THE VINDICATION OF MULTIPLE VALUES

In addition to offering to feminist analysts of the dilemma of choice an economics- and contract law-based framework for understanding at least some of the core issues involved, *The Limits of Freedom of Contract* also offers feminists some perspective on the salience of the dilemma itself. What Trebilcock takes away from the

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(New York: New York University Press, 1989) 279; and "Preferences and Politics" (1991) 20 *Phil. & Pub. Aff.* 3.

divergence between autonomy and welfare that he illuminates is not a dilemma, but rather an agenda for the integration of multiple values in the design of legal rules and institutions.

Trebilcock's point is this:

Too often, we confound debates about choices of values with debates about choices of instruments. In other words, it seems important that we try to think clearly about an appropriate institutional division of labour for vindicating these values, recognizing that they all command legitimate adherence.<sup>19</sup>

Trebilcock's view is that endorsing autonomy does not imply choosing the market over regulation or ignoring actual welfare in favour of deference to private ordering. Nor does endorsing wealth redistribution or the achievement of communitarian goals imply choosing regulation or generic legislation over the market. In many cases, when close attention is paid to the actual relationship between a particular goal such as autonomy or welfare and a particular instrument, such as contract law, it is possible to use a multi-pronged approach so as to vindicate multiple values. Trebilcock refers to this approach as the "institutional division of labour."

This multi-institutional approach may provide feminists with a way out of the dilemma of choice. The divergence between autonomy and welfare poses a dilemma because the issue is seen to require a definitive choice between promoting *either* autonomy values *or* welfare values; it is thought that the legal/institutional regime must be that which favours one or the other. In the surrogacy setting, for example, the question is often thought to be whether to promote autonomy, and permit freedom of contracting in surrogacy, or to promote welfare, and therefore to prohibit surrogacy contracts. Framed in this way, the dilemma is stark.

But if we recognize, along with Trebilcock, that conflicts between autonomy and welfare are in some sense routine and that it is commonplace to require various social or communal institutions to remediate the divergences between these two values, then feminist dilemmas of choice take on a different cast. What becomes most important is not a resolution of the dilemma, for there probably is not one, but rather a detailed assessment of how various institutions might be coordinated so as to promote both autonomy and welfare. On the surrogacy issue, for example, Trebilcock recommends that autonomy values be vindicated by a basic permissive stance with respect to contracts, allowing individuals to judge for themselves the implications

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<sup>19</sup> Trebilcock, *supra* note 11 at 248.

of these arrangements for their well-being. But he also recommends that in the event the birth mother has a change of heart, custody reside with her, both to mitigate the risk of emotional damage to her and to protect the child from the harm of legal battles over custody. This approach seeks to respond to the concern that birth mothers entering into these contracts face tremendous difficulties in identifying and pursuing their best interest, not by disabling their autonomy, but rather by construing the implications of an exercise of their autonomy so as to protect their well-being. The approach simultaneously makes a judgment that prospective adoptive/biological parents are in a better position to identify and pursue their best interests, even in light of a rule that shifts to them the risk of emotional pain in the event of an error by the birth mother. We can also imagine blending this approach with other methods of seeking to ensure that a potential birth mother exercises her autonomy in such a way as to truly promote her well-being without depriving her of autonomy. Counseling, both psychological and legal, could be mandated by government and/or offered through community organizations. Conflicts of interest for attorneys who both represent the commissioning parents and recruit women to act as birth mothers could be regulated, even to the extent of prohibiting attorneys from taking on simultaneous roles as legal counsel and recruiter. Feminist organizations could undertake, perhaps with government funding, to provide education to potential birth mothers and lend assistance in their effort to determine whether and how to exercise their power of choice. Thus, views such as that put forward by Nedelsky, that we must look to law to help structure the relations that establish the preconditions for truly autonomous choice, can be incorporated as part of a multi-institutional approach rather than forming the basis for a choice between institutions. The point is that, even for feminists who conclude that the practice of surrogacy is ultimately damaging for all women, there are solutions that fall short of singular prohibition and a choice of welfare (ultimately judged by the community and not the individual) over autonomy.

As another example of the possible reconciliations of autonomy and welfare values, consider the issue of separation agreements following divorce. It is possible, I believe, for women to retain the power to enter into separation agreements, even in light of concerns that they will frequently be led to poor agreements. This could be done by limiting the duration of the initial agreements that divorcing couples can reach and requiring renegotiation of the agreement after a year or two when we might expect that the emotional difficulties that distort women's exercise of autonomy in the agreement will have subsided

somewhat and women will have gained a greater sense of their autonomy from their ex-husbands. Women can also be assisted in making decisions about separation agreements by access to advice and counseling, public or private, and to legal rules that provide concrete background entitlements for support. The enforcement of separation agreements also can depart from conventional enforcement of commercial contracts, with heightened standards for fairness via a form of unconscionability doctrine, for example. Again the point is that we need not be drawn into a sharp choice between private and public ordering with respect to support arrangements by a sharply defined conflict between autonomy and welfare in the divorce setting.

What will matter most for feminists, I believe, in addressing the dilemma of choice is not how we will choose between autonomy and welfare for women but how well we will do, how creative we will be, and how willing we will be to reject received institutional truths in designing institutions that promote both of these central values for women. Improving women's well-being, we can hope, need not come at the expense of transferring the power to decide for women from traditional exploitative elites to even well-intentioned feminist elites.

#### IV. CONCLUSION

Much of the view that there are alternatives to the "either-or" form of the dilemma of choice will be familiar to feminists. The value of Trebilcock's work for feminists, I believe, is that he offers a sustained and careful treatment of the rationale for the multi-pronged approach to issues that present a conflict between autonomy and welfare for women. In addition, he unifies the feminist critique of autonomy, in some respects, with mainstream analysis based in contract doctrine and economics. Some feminists will be uncomfortable with this alliance, no doubt, but my own view is that the points of convergence between the feminist critique of choice and Trebilcock's critique of the laissez-faire convergence claim strengthen both. Trebilcock's work is enriched by the fact that it speaks to significant feminist concerns about women's well-being under a market system and private ordering through contract law; feminist work is bolstered by the demonstration that simplistic claims about the benefits of private ordering have a very weak basis in the very world of the market and economic analysis that they purport to inhabit and justify. Feminist critiques of choice are in no sense consumed by Trebilcock's analysis; there is, as I remarked at the outset, a deeper set of concerns about the impact, broadly speaking, of market



and contract relations on the nature of being human and being female. These concerns are not addressed by Trebilcock. But it may be that by clarifying the terms of the dilemma of choice and placing it in context, Trebilcock's work offers a way out of a struggle with the narrow versions of the dilemma and on to this broader terrain.

