



## Osgoode Hall Law Journal

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

Article 6

# Critiques of the Limits of Freedom of Contract: A Rejoinder

Michael J. Trebilcock

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>  
Special Issue Article

### Citation Information

Trebilcock, Michael J.. "Critiques of the Limits of Freedom of Contract: A Rejoinder." *Osgoode Hall Law Journal* 33.2 (1995) : 353-377.  
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol33/iss2/6>

This Special Issue Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

---

# Critiques of the Limits of Freedom of Contract: A Rejoinder

## **Abstract**

This rejoinder to the foregoing critiques of the author's book, *The Limits of Freedom of Contract*, focuses on several themes: a) what range of contractually-related issues do courts possess the requisite institutional competence to address? b) whether problematic normative issues in contract law are amenable to rational analysis and at least provisional resolution, or are inherently indeterminate, contingent, and political? c) what the value of individual autonomy implies in terms of the type of transactions parties should be permitted to engage in? d) whether an "internal" rather than consequentialist theory of contract law is conceivable? and e) whether autonomy values are inconsistent with welfare values in women's participation in market activities?

# CRITIQUES OF *THE LIMITS OF FREEDOM OF CONTRACT:* A REJOINDER<sup>©</sup>

BY MICHAEL J. TREBILCOCK\*

This rejoinder to the foregoing critiques of the author's book, *The Limits of Freedom of Contract*, focuses on several themes: a) what range of contractually-related issues do courts possess the requisite institutional competence to address? b) whether problematic normative issues in contract law are amenable to rational analysis and at least provisional resolution, or are inherently indeterminate, contingent, and political? c) what the value of individual autonomy implies in terms of the type of transactions parties should be permitted to engage in? d) whether an "internal" rather than consequentialist theory of contract law is conceivable? and e) whether autonomy values are inconsistent with welfare values in women's participation in market activities?

En réponse aux critiques précédentes de l'oeuvre *The Limits of Freedom of Contract*, l'auteur examine les sujets suivants: a) quelle est la portée de la juridiction inhérente des tribunaux quant aux questions contractuelles? b) les questions théoriques du droit des contrats peuvent-elles être étudiées de façon rationnelle afin d'obtenir une résolution logique ou, au contraire, sont-elles d'un caractère indéterminé, contingent, et essentiellement politique? c) que signifie le principe de l'autonomie personnelle relativement au type de transactions qui devraient être permises aux parties contractantes? d) est-il possible d'envisager une théorie contractuelle soit «interne» plutôt que simplement accessoire aux autres domaines juridiques? e) les valeurs autonomistes sont-elles en contradiction avec les valeurs sociales étatiques véhiculées par la participation des femmes au marché économique?

I. RICHARD CRASWELL, "REMEDIES WHEN CONTRACTS LACK CONSENT: AUTONOMY AND INSTITUTIONAL COMPETENCE" .....	354
II. ALLAN C. HUTCHINSON, "MICHAEL AND ME: A POST-MODERN FRIENDSHIP" .....	359
III. HAMISH STEWART, "WHERE IS THE FREEDOM IN FREEDOM OF CONTRACT? A COMMENT ON TREBILCOCK'S <i>THE LIMITS OF FREEDOM OF CONTRACT</i> " .....	365
IV. PETER BENSON, "THE IDEA OF A PUBLIC BASIS OF JUSTIFICATION FOR CONTRACT" .....	369
V. GILLIAN K. HADFIELD, "THE DILEMMA OF CHOICE" .....	373

---

© 1996, M.J. Trebilcock.

\* Director, Law and Economics Programme, Faculty of Law, University of Toronto.

I. RICHARD CRASWELL, "REMEDIES WHEN CONTRACTS LACK CONSENT: AUTONOMY AND INSTITUTIONAL COMPETENCE"<sup>1</sup>

In offering a rejoinder to Professor Craswell's critiques of my book, I should acknowledge a deep sense of gratitude to Professor Craswell, who was one of the reviewers retained by Harvard University Press to review the manuscript. After some laudatory, and I hope not perfunctory, comments at the beginning of his review, he offered twenty-nine single-spaced pages of detailed critical comments, which led me to make major revisions to the manuscript in almost every chapter, substantially improving the book (whatever its remaining deficiencies). Thus, I view Professor Craswell's criticisms today as a stubborn residual that has defied all reasonable attempts at accommodation on my part.

Professor Craswell's method of critique is to take seriously, as I do, autonomy-based rationales for freedom of contract and then to focus on implications of the requirement of consent, which is necessarily integral to such theories of contractual obligation. As I argue in my book, and as Professor Craswell accepts, consent to contractual obligations may be claimed to be absent or deficient for two broad reasons: coercion, or imperfect information.

While the conceptual issues involved in developing a coherent theory of coercion, or a coherent theory of asymmetric information, are daunting, Professor Craswell suggests that these issues can be side-stepped to some extent by focusing on the remedial options open to courts, that is, by taking account of their relative institutional competence to fashion appropriate remedies. In some cases—for example, gun-at-the-head coercion cases and fraud cases—a court's response may be straightforward. Where the contract is fully executory, or where rescission would readily lead to a restoration of the *status quo ante*, a simple declaration of the invalidity of the contract may be the only response called for from the courts. However, in other cases, where goods or services provided under the impugned contract have been consumed, or cannot be restored for other reasons, or where the party seeking relief would find full restoration of the *status quo ante* highly disadvantageous, the remedial options open to the courts are less straightforward. The options would typically entail the courts' upholding the contract while substituting some more reasonable set of terms for those actually employed in the contract and impugned on the grounds of

---

<sup>1</sup> (1995) 33 Osgoode Hall L.J. 209.

either coercion or information asymmetry. In these cases, Professor Craswell expresses serious reservations as to the ability of the courts to craft alternative "reasonable" terms of their own in substitution for the terms apparently consented to by the parties. He also suggests that, in most cases, the courts may be well-advised to enforce the terms of the contract as written, despite objections that they have not been truly consented to. I am largely unpersuaded by Professor Craswell's critique and proposal, which seems to me to lead to a very austere and impoverished role for the law of contracts.

Let me take first the case of coercion and my foundering ship example,<sup>2</sup> upon which Professor Craswell focuses. It is true that, in this example, the foundering ship owner, who is induced to pay an excessive salvage fee to the only tug operator in the vicinity, would not rationally seek rescission of the contract and the restoration of the *status quo ante*, but would rather seek the substitution of a more reasonable salvage fee than that apparently agreed to. In arguing that the courts should be prepared to perform such a role in this class of case, I draw a crucial distinction (of which Professor Craswell is sceptical) between situational and structural monopolies. I view the foundering ship case as a situational monopoly that does not reflect broader or systemic competitive problems in the tug industry, but that reflects the serendipitous circumstances of the interaction between the two parties in question. I distinguish this type of case from the kind of structural monopolies traditionally exemplified by natural monopolies in utility industries, such as electricity and telecommunications, where we have typically seen the creation of specialized administrative agencies to review and approve the pricing and related policies adopted by such monopolies. Professor Craswell argues that a well-conceived legal intervention is no easier in the one case than in the other, and that if we believe that the courts are not well-equipped to be assigned the responsibility for the legal oversight of structural monopolies, then they are no more likely to perform well in disciplining the contractual conduct of situational monopolies. I disagree with his conclusion.

One observes that in most jurisdictions in both the common law and the civil law worlds, structural monopolies are regulated by specialized administrative agencies, and that the more *ad hoc* forms of monopolization characteristic of situational monopolies are left to be dealt with by the courts under doctrines such as duress, unconscionability, and inequality of bargaining power. There are good

---

<sup>2</sup> M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) at 85.

reasons for this basic institutional division of labour. It is true, as Professor Craswell argues, that in the case of structural monopolies, regulatory agencies have generally not done a very good job (from an economic perspective) in regulating price, output, investment, and operating cost decisions. This leads to increased pressure to deregulate many of these industries where technological developments render competitive options feasible. Alternatively, price-cap forms of regulation might be substituted for rate-of-return regulation because of ease of administration and more desirable incentive properties. However, so far as I know, no one has suggested that ongoing regulation of these structural monopolies would be better remitted to the courts, whatever the imperfections in the current regulatory processes. On the other hand, since the last century, courts in both Great Britain and the United States, in cases akin to the foundering ship example, have routinely substituted reasonable salvage terms for extravagant ones extracted under coercion.<sup>3</sup> Similarly, in European civil law systems, the doctrine of duress has conventionally been applied to precisely this type of case in order to enable courts to substitute more reasonable terms for those apparently agreed to, but only under coercive threat.<sup>4</sup> There are good reasons for supposing that legal oversight of situational monopolies is likely to be substantially easier than legal oversight of structural monopolies. By definition, there are many competitive reference points in the industry to which the courts can have recourse in establishing normal, reasonable prices for the kind of tasks in issue, but where the potential for coercion is absent. By contrast, when an entire industry is monopolized, as in the case of structural monopolies, these competitive reference points are, by definition, absent, or require much more speculative and contestable extrapolations from experience in other industries or other jurisdictions. Moreover, given the *ad hoc* and eclectic range of circumstances likely to arise in situational monopolies, it is far from clear how one could set up a specialized administrative agency that could credibly assert expertise superior to that of the courts across the whole range of settings in which these problems are likely to arise.

I take a similar view with regard to the second broad category that Professor Craswell addresses—information imperfections—using as the example an apparently disadvantageous term in a standard-form

---

<sup>3</sup> See *Akerblom v. Price, Potter, Walker, & Co.* (1881), 7 Q.B. 129 (C.A.); *The Port Caledonia and the Anna*, [1903] P. 184; *Post v. Jones*, 60 U.S. 618 (1857).

<sup>4</sup> See J.P. Dawson, "Economic Duress and the Fair Exchange in French and German Law" (1937) 11 Tul. L. Rev. 345 at 353-55.

contract, which the consumer did not read or understand. On the assumption that it is either not feasible to cancel the entire transaction, or that it would be disadvantageous to the consumer who consumed, or wishes to retain, the goods or services in question, the courts again face the problem of (a) insisting on real consent (through requirements of specific explanation) as a precondition to enforceability (not a realistic option, as Professor Craswell and I agree); (b) substituting some alternative set of terms; or (c) simply ignoring the problem and enforcing the contract as written (which Professor Craswell advocates). As in the coercion cases, this view seems to entail a much too impoverished role for the law of contract. In my discussion of the problems presented by standard-form contracts in the book,<sup>5</sup> I argue that courts, in evaluating the fairness of standard-form contracts in the kind of cases that Professor Craswell has in mind, should investigate whether a consumer seeking relief from particular contractual provisions has received a deal that is significantly inferior—in either the explicit terms of the contract or in the performance provided by the other party under it—to the deal realized by marginal consumers in the same market, with the economic as opposed to personal characteristics of consumers in these two classes held constant. By marginal consumers I mean informed, sophisticated, and aggressive consumers, who understand the terms of standard-form contracts on offer, and who either negotiate over those terms or switch their business readily to competing suppliers offering more favourable terms. In other words, where a supplier has deliberately exploited a consumer's ignorance of terms generally available in the market for like goods or services to consumers in an economically similar situation, in order to extract terms substantially inferior to the generally prevailing ones, a supplier's actions should be viewed as unconscionable, and courts should feel free to substitute more reasonable terms, not necessarily inventing them out of whole cloth but, as in the coercion cases, by drawing on empirically-observable reference points elsewhere in the same market. By way of analogy to the distinction I draw between situational and structural monopolies, I explicitly argue, in my discussion of standard-form contracts, that in markets so badly disrupted by imperfect information that there is no identifiable margin of informed consumers from which appropriate reference points can be derived, judicial sniping in case-by-case litigation is less appropriate than the kind of legislative or regulatory intervention that has occurred in many jurisdictions, for example, with respect to various types of door-to-door sales. Thus, I

---

<sup>5</sup> Trebilcock, *supra* note 2 at 119-20.

believe that I have been both consistent and realistic, in terms of relative institutional competence, in the role that I would assign to the courts in policing both coercion and information asymmetries.

While Professor Craswell, in his comments on my book, does not explicitly address the kind of symmetric information imperfections that have traditionally been addressed under doctrines of mutual mistake or frustration, the position he takes on coercion and information asymmetries would seem to yield equally unconvincing implications in this third type of case. The paradigmatic case that I have in mind is a long-term contract where the expectations of the parties are disturbed by the occurrence of some contingency, and where the party that would be disadvantaged by continuing performance of the contract seeks relief on the grounds of frustration. Unless one takes the very strong position espoused by Professor Triantis<sup>6</sup> that all contracts should be viewed as, at least implicitly, impounding in their initial terms all future contingencies, one has to contemplate the possibility that some contracts will be incomplete. Some contracts will be incomplete in the sense that the parties neither explicitly nor implicitly can reasonably be viewed as having agreed to any particular risk allocation with respect to the contingency that is now in issue. Here, once one has assumed or concluded that the parties have not consented to anything in particular with respect to the contingency in question, to argue that the contract should be enforced as written, because the courts are unlikely to do a better job than the parties in formulating an alternative set of terms, is by hypothesis an irrelevant response. If the contract is incomplete, then it is silent on the issue in question and the parties simply have not brought their minds to bear on it. While I argue in my book for a relatively conservative view of when such contingencies have not been considered, at least in a contract between two sophisticated commercial parties, it seems difficult, if not impossible, to reject altogether the possibility that there will be some small subset of risks—perhaps quite outlandish risks, as I refer to them<sup>7</sup>—which the parties to the contract cannot be viewed as having consented to allocate in any particular way. In this case, it is possible that the courts could take the view, as they traditionally have, that the only remedy open to the parties is simply to cancel the contract as of the date of the occurrence of the frustrating event and let all losses lie where they fall. However, for reasons that have been well explored in the legal literature on the doctrine of

---

<sup>6</sup> G.G. Triantis, "Contractual Allocations of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability" (1992) 42 U.T.L.J. 450.

<sup>7</sup> Trebilcock, *supra* note 2 at 144-46.



frustration, this is often a very crude remedial response in that the disadvantaged party, by successfully invoking the doctrine of frustration, can now throw all losses on the other party. Conversely, to enforce the contract as literally written in these circumstances is likely to cast all the losses from the occurrence of the contingency on the party seeking to avoid further performance. In such situations, I think a plausible case can be made for some intermediate solution that entails risk- or loss-splitting (imperfectly recognized in *Frustrated Contracts Acts*),<sup>8</sup> perhaps by applying a relatively crude but clear rule of a 50/50 split of the losses, leaving parties, in light of this rule, to contract away from it *ex ante* if they so choose. Like Professor Craswell, I am sceptical of the wisdom of courts attempting to reformulate entire sets of contract terms more or less out of thin air, as the court attempted to do in the well-known American case of *Aluminum Co. of America v. Essex Group, Inc.*<sup>9</sup> A non-mandatory across-the-board rule of risk-splitting in this small subset of cases, while crude, may be superior to rank judicial *ad hocery* of the kind exemplified in *Alcoa*, or to looking for competitive benchmarks elsewhere in the industry regarding how contracting parties who have addressed the type of risk in question have chosen to allocate it when, in many of these large long-term contracts, the nature of the contractual relationship is *sui generis* and alternative competitive reference points (unlike the coercion and standard form contract cases discussed above) may not be readily available.

I do not pretend that the role of the courts in policing for coercion, information asymmetries, or symmetrical information failures in contractual relationships is easy. However, it is far from clear to me that, if properly structured, this task is any more complicated than the thousand-and-one other factual and legal determinations that courts must make every day in civil litigation, let alone in more complex public law litigation.

## II. ALLAN C. HUTCHINSON, "MICHAEL AND ME: A POST-MODERN FRIENDSHIP"<sup>10</sup>

As always, Allan Hutchinson's comments represent a refreshing and invigorating challenge to more conventional thinking, and I am

---

<sup>8</sup> See, for example, *The Frustrated Contracts Act*, R.S.O. 1990, c. F-34.

<sup>9</sup> 499 F. Supp. 53 (D. Pa. 1980) [hereinafter *Alcoa*].

<sup>10</sup> (1995) 33 Osgoode Hall L.J. 237.

delighted to reply to them in the same vigorous vein. Allan and I have been friends for many years, but I sense from his comments on my book that our friendship is a source of some anguish to him. At the start of his comments, he worries that our friendship has led to a compatibility of viewpoints on many issues, which might suggest momentary lapses of progressive denial on his part, or provide evidence that he and other Critical Legal Scholars are not the progressives they proclaim themselves to be, but middle-of-the-roaders masquerading in radicals' clothing. On the other hand, at the end of his comments, he sounds a note of wistful regret over my failure to accept his invitation to follow him through the Red Sea to the post-modernist promised land beyond and thus, it seems, preventing a full consummation of our friendship. Nothing I am about to say in these comments is likely to ease Allan's anxieties, and may indeed exacerbate them.

Allan's first line of critique of my book is to suggest that I have been a post-modernist all along without knowing it or, at least, without admitting it. His basis for this claim is that my book is shot through with a post-modern emphasis on contingency and indeterminacy. He claims that the result of my analysis, in almost all cases, is that it is "too close to call."<sup>11</sup> I believe that this criticism is both unfounded and unfair. In exploring the limits of freedom of contract, I consciously chose to analyze a range of difficult and controversial cases such as blood donation, organ transplantation, pornography, immigration, free trade, prostitution, surrogacy, and racial discrimination. This seems a readily defensible strategy in that, had I chosen commercial contracts for the sale of cargoes of corn or consumer contracts for the purchase of tubes of toothpaste to test the limits of markets, I would rightly have attracted from Allan and others the charge of rigging the deck by tackling easy cases. However, in analysing the hard cases that I do address, with a view to testing as searchingly as possible the limits of markets and freedom of contract, I make a conscious attempt to canvass fairly and sympathetically a broad range of views from different normative perspectives taken on most of these issues. A number of commentators have noted that this is one of the more distinctive features of the book. In reviewing these perspectives on particular controversies, there is obviously an "on the one hand, on the other hand" tone to the analysis. However, *in every case*, I reach rather concrete normative conclusions (sometimes with difficulty, and albeit provisionally) as to how these controversies should be resolved. In hardly any cases do I regard the issues as too close to call. Indeed, given the intensity of the normative

---

<sup>11</sup> *Ibid.* at 240.

controversies surrounding most of these issues, I am more vulnerable to the opposing charge of being tendentious in reaching conclusions where others with a greater sense of self-preservation may fear to tread. Indeed, Allan simultaneously accuses me of this failing when he refers to my "anxiety to craft solutions that are somehow apt for all times and places," and to my vulnerability to the temptation to seek "theoretical finality and practical dogma."<sup>12</sup> Surely, I cannot simultaneously be open to both charges.

Another line of critique that Allan develops rests on my failure to offer a *meta*-theory that weighs or ranks various core values of autonomy, efficiency, distributive justice, and communitarianism that I address throughout the book. Instead I suggest that significant progress can be made at a lower level of abstraction by identifying the institutions or instruments available to a community which are best able to vindicate these values, given that all of them appear to have cogency in particular contexts. I appreciate that among high theorists it is fashionable to denigrate moral pluralism. I have never understood this penchant. As a matter of simple intuition, each of us in the various facets of our lives attempts to vindicate, to some extent or another, all of these values. As I state in the book, a one-value view of the world is likely to prove self-defeating for most individuals. Allan suggests that in this morally pluralist world the best that I have to offer is "to think clearly" and that this is a rather lame solution.<sup>13</sup> This is not, in fact, what I propose. What I suggest is that we should try to think clearly about an appropriate institutional division of labour for vindicating all these values, recognizing that they all command legitimate adherence. I believe that one of the principal and, I hope, most useful contributions of the book is to emphasize the centrality of the question of relative institutional competence in deciding which of our various social and legal institutions are best placed to vindicate each of the various core values that I review and to which, I maintain, almost all of us subscribe in one context or another. I do not believe that this suggestion is either vacuous or lame but rather that it is an extremely important challenge. Moreover, no matter how formidable the challenge, it seems to be, in principle, more likely to lead to progress than does the attempt to formulate a *meta*-theory that ranks or weighs the various core values to which most of us subscribe. The latter is a task that has eluded moral and political philosophers for almost 3,000 years, and one that does not seem likely to

---

<sup>12</sup> *Ibid.* at 251.

<sup>13</sup> *Ibid.* at 242.

be resolved in the near future; even if it were, it would attract Allan's standard criticism that no truth is final but, rather, is historically and politically contingent.

The third critique of my book developed by Allan is that I take the market as a given and not as in need of moral justification, and suggest that the burden of justifying intervention in markets lies on those who propose it. I think that this criticism is unfair. The first chapter of the book is mostly devoted to advancing both economic and political arguments in favour of the market, rather than simply assuming that the virtues of the market are self-evident, as well as to arraying a number of fundamental critiques of the market. In citing Gauthier, with regard to my discussion of commodification, to the effect that, "the perfect market, were it realized, would constitute a morally free zone, a zone within which the constraints of morality would have no place," I emphasize, as does Gauthier, that in many contexts "morality arises from market failures," and that substantial progress can be made in resolving moral dilemmas by avoiding abstract concepts such as "commodification" and "human flourishing."<sup>14</sup> However, I recognize that in focusing on actual or potential market or contracting failures such as coercion, information failures, and externalities, these concepts are themselves far from straightforward. Also, in the final chapter of the book, in referring to "the unfinished normative agenda" even after contracting and market failures have been fully addressed through one legal instrumentality or another, I argue that the principal value left unvindicated is distributive justice.<sup>15</sup> Here I develop an extensive argument for why the state should be involved actively in redistributive programmes, principally directed to promoting the development of human capital, which Allan is kind enough, in his closing comments, to refer to as "an admirable and noble ambition."<sup>16</sup> In any event, when I refer to "the burden of justifying intervention,"<sup>17</sup> I do so in the specific context of which categories of paternalism the law should be responsive to, a context which Allan fails to identify. What I in fact argue is that, beyond cases of cognitive incapacity and choices that do not reflect underlying preferences (quite large categories), the case for paternalistic legal interventions on grounds of contingent, adaptive, or bad

---

<sup>14</sup> Trebilcock, *supra* note 2 at 29, citing D.P. Gauthier, *Morals by Agreement* (New York: Oxford University Press, 1986) at 84.

<sup>15</sup> Trebilcock, *supra* note 2 at 253.

<sup>16</sup> Hutchinson, *supra* note 10 at 258.

<sup>17</sup> Trebilcock, *supra* note 2 at 163.

preferences becomes much more problematic, and the burden of justifying intervention correspondingly much stronger, simply because clearly definable individual preferences are being repudiated in the absence of readily identifiable forms of coercion, information failure, or externalities.

The fourth critique that Allan advances is that I do not take seriously the endogeneity of preferences. In fact, I do not argue, as he claims, that the challenge is to predict the kind of choices people would “make in the absence of social, economic, legal or other influences that have shaped these preferences,”<sup>18</sup> but rather that others have argued that individual choices often reflect preferences that are at variance with the kinds of choices such individuals would make in the absence of these influences. I explicitly distance myself from this argument, by pointing out that it is potentially subversive of all traditional autonomy values.<sup>19</sup> Moreover, I point out that there is a fundamental circularity problem with theories of endogenous preferences: presumably *any* form of social, economic, or legal organization will be vulnerable to the same claim, so that the validity of individual preferences will be open to challenge *ad infinitum*.<sup>20</sup> Allan claims that I am insensitive to the fact that all preferences will reflect these broader influences. I am not, but to view all preferences as suspect and unworthy of serious respect—whatever the form of social, economic, or legal organization which has shaped them—is a licence for tyranny and is directly antithetical to the populist, participatory politics that Allan so passionately advocates. Such politics are respectful of the worth of individual viewpoints and values and are concerned that all individuals have some reasonable opportunity to express them, and in turn be influenced by the views and values offered by others.

In advocating a post-modernism that implies an egalitarian and pluralist participatory democracy, Allan argues that attention must be focused on the process in and through which people make substantive decisions, and that participation in market activities, standing alone, is an impoverished view of participatory possibilities that ought to be open to citizens in a post-modern world. At one level, I do not disagree. Indeed, in the final chapter in my book, I am critical of extreme forms of Public Choice theory, precisely because they fail to take account of the influence of ideas in collective decision-making processes and also

---

<sup>18</sup> *Ibid.* at 243.

<sup>19</sup> *Ibid.*

<sup>20</sup> *Ibid.* at 158.

because people are amenable to changing their views (or preferences) in reasoned debate and discussion.<sup>21</sup> Moreover, in proposing institutional reforms that elevate reasoned argument and a principled justification in the policy-making process, I explicitly emphasize that these institutional reforms should promote the values of transparency, accountability, and participation in collective decision making.<sup>22</sup> Again, with respect to the role of the academy, I am critical of academics who write to each other, typically within narrow parochial enclaves, or who, when not writing to each other, advise the prince rather than the public, and thus fail to take more seriously the proposition that many individual preferences are socially constructed and amenable to revisions in the light of reasoned argument and new evidence.

At another level, I fundamentally question Allan's overwhelming preoccupation with process over substance. No matter how robust a kind of participatory democracy one has in mind, and no matter how successful efforts at energizing "the public square" may be, public debates and discussions that are designed to permit the articulation and antagonism of different forms of life must have a beginning and an outcome (no matter how provisional and contingent). It is hard to get a conversation started unless someone offers a provisional view. If everyone takes the position that a provisional view is too presumptuous and disrespectful of other participants in the conversation, there will be a collective silence. My book was the result of presenting preliminary ideas and then preliminary drafts to students in upper-year seminars and debating the ideas passionately with them, by presenting drafts of chapters to fellow academics at law schools and other academic institutions throughout North America and elsewhere, and by presenting the views elaborated in it (as I acknowledge in the preface) at informal Friday night seminars at the Idler Pub to people from all walks of life (not academics). The ideas were revised repeatedly through these exchanges. This kind of process starts with a provisional set of ideas that gets refined or rejected in the light of compelling criticisms or alternative perspectives. To an important extent, the book is a chronicle of these debates and this gives it the eclectic quality that other commentators have noted. However, this process had to come to an end at some point, at least if one wished to publish the debate up to that juncture, along with whatever provisional views one arrived at in the process of the debate. Hence the book is, of course, subject to further revisions in light

---

<sup>21</sup> *Ibid.* at 265-68.

<sup>22</sup> *Ibid.* at 267.

of the views expressed in this volume, and those that may be advanced in the future. But, more importantly, this process is necessarily replicated in the broader polity, where the kinds of issues I canvass in the book—such as surrogacy, prostitution, racial discrimination, and immigration policy—require at least provisional policy responses. One cannot leave these issues unresolved while one debates them forever. One provisionally resolves them, continues to debate them, perhaps leading to a reopening of the issues and some different resolution in the future. In this sense, I agree with Allan that all public policy and legal decisions are provisional and contingent, but that is not to say that there are no decisions that need to be reached at any given point in time.

Thus, I am led to a major sense of puzzlement at the personal level of my friendship with Allan. If he were teaching or writing about contract law (defined expansively as I have done in the book), and were he to be addressing one of the difficult and controversial issues that I have addressed in the book, would his opening and final comment on the issue be: "Let's talk about it," or "Let's keep talking about it?" To quote Jerry Lee Lewis (who, I acknowledge, does not compare with William Blake), "there's a whole lot of shakin' going on" in Allan's world, but is there anything else? As a normative matter, I think Allan has a great deal more to offer than this, which is why I value him so highly as a friend, as long as our friendship does not require me to join him on the other side of the post-modernist divide.

### III. HAMISH STEWART, "WHERE IS THE FREEDOM IN FREEDOM OF CONTRACT? A COMMENT ON TREBILCOCK'S *THE LIMITS OF FREEDOM OF CONTRACT*"<sup>23</sup>

Professor Stewart's principal line of critique of my book is that I do not consider a particular understanding of autonomy wherein freedom of choice is presupposed in the doctrines of contract law. These doctrines treat the contracting parties as autonomous agents who are free and equal in the sense that they have an abstract capacity to enter into contracts. On this view, regardless of whether freedom of contract is instrumentally or intrinsically valuable, it is an inescapable aspect of contract law. He develops this critique by taking two sets of examples: one from my discussion of commodification, and another from my discussion of coercion.

---

<sup>23</sup> (1995) 33 Osgoode Hall L.J. 259.

With respect to my discussion of commodification, Professor Stewart focuses on the commercial surrogacy example, and on my analysis of surrogacy contracts from both the autonomy and the welfare perspectives. I conclude that from neither perspective are there grounds for prohibiting outright commercial surrogacy contracts, but that there are grounds for regulating them, much along the lines that we regulate adoption decisions, and in particular by allowing the natural mother a period of time following birth to revoke any prior decision to give up her baby.

Professor Stewart, drawing on John Stuart Mill's famous example of contracts of self-enslavement, argues that there must be something that cannot be subject to contract, namely the agent's capacity to contract on freedom and autonomy itself. He argues that it would be contradictory to suppose that the very feature of an agent that made contractual exchange possible could itself be permanently exchanged. The agent would in effect be simultaneously denying and asserting his or her capacity to contract or, in Mill's terms, the principle of freedom cannot require that a person "should be free not to be free."<sup>24</sup> Professor Stewart draws further support from Hegel, who argued that by alienating the whole of one's time as crystallized in one's work and everything that one produced, one would be making the substance of one's being (one's universal activity and actuality, one's personality) into another's property. Professor Stewart goes on to argue that reproductive capacity may be so closely tied to a person's agency that it cannot be alienable, and that if a mother cannot alienate her own agency, it would seem equally implausible that she could be able to alienate her baby. Professor Stewart concedes that "[t]hese arguments will not necessarily be decisive against surrogacy contracts," but he is notably unforthcoming in indicating what kinds of further considerations might properly weigh on the other side.<sup>25</sup>

I find his invocation of Mill and Hegel unhelpful in the surrogacy context. Obviously, surrogacy contracts are not lifetime contracts for self-enslavement or for the permanent alienation of the whole of one's time. Whether reproductive capacity is so closely tied to a person's agency that it cannot be alienable presumably requires some additional line of argument. The analogy that I consistently invoke in my analysis of surrogacy contracts relates to current adoption laws. Laws in Canada and in most other jurisdictions around the world permit birth mothers to

---

<sup>24</sup> J.S. Mill, *On Liberty* (New York: Macmillan, 1956) at 125.

<sup>25</sup> Stewart, *supra* note 23 at 265.



alienate their children through adoption, subject to various legal controls and constraints. Why is this form of alienation any less objectionable than surrogacy contracts, or is it equally objectionable? Moreover, a woman's decision to abort a baby may be objectionable on the grounds that it is a form of alienation inconsistent with the baby's own agency. Does Professor Stewart's argument imply a pro-life position on abortion? With respect to the argument that a woman's decision in a surrogacy contract to temporarily alienate her reproductive capacity is inconsistent with her human agency, does it follow that Professor Stewart would criminalize, to an even greater extent than is currently the case, prostitution and its surrounding activities? Mill's objections to contracts of lifetime self-enslavement hardly seem helpful in working out positions on any of these issues.

With regard to my discussion of coercion, Professor Stewart presents a series of examples—some drawn from my book and others of his own—to show that I would ultimately resolve these questions by reference to a welfarist baseline that draws attention away from the autonomy of the choosing agent. I accept as well-taken Professor Stewart's criticism of my analysis of the lecherous millionaire example,<sup>26</sup> where I acknowledge that the objections to the transaction are less likely to reside in issues of coercion than in the kind of issues of commodification about which I had previously expressed some scepticism. However, his other objection to my analysis of the coercion issue rests on the distinction I draw between situational and structural monopolies, and on the test I propose for resolving many coercion cases with respect to situational monopolies. Here, I would ask whether the situational monopolist has extracted terms from the other party that substantially exceed the terms which would prevail with respect to this class of transaction in a competitive market. He objects to me endowing the competitive baseline with normative significance, although I should note parenthetically that I am in good company here in that both Professor Peter Benson and Professor James Gordley, in various writings from a non-economic perspective, have argued for a rule of equivalence or equality in exchange where, in measuring the equivalences of goods exchanged, prices in reasonably competitive markets would be used as the basic reference point.<sup>27</sup> However, this is not a complete rejoinder, because we may all be mistaken, albeit for

---

<sup>26</sup> Trebilcock, *supra* note 2 at 90-91.

<sup>27</sup> See P. Benson, "Abstract Right and the Possibility of a Non-distributive Conception of Contract: Hegel and Contemporary Contract Theory" (1989) 10 *Cardozo L. Rev.* 1077 [hereinafter "Abstract Right"]; J. Gordley, "Equality in Exchange" (1981) 69 *Calif. L. Rev.* 1587.

different reasons, in adopting this reference point. Perhaps Professor Stewart has in mind a more medieval notional of the just price.

Professor Stewart presents two examples that he considers particularly damaging to my analysis. The first is what he calls the altruistic robber case, where an armed robber holds up a victim and offers to pay him twice the value of his watch under threat of taking his life. Because the consideration offered exceeds the competitive value of the goods in question, on my test, applied without qualification, I would be required to enforce this exchange, notwithstanding that the victim's consent could scarcely be viewed as freely given. By way of reply, let me say first that if this is the most damaging example for my analysis, its quaint and other-worldly quality leaves me largely unperturbed. However, if we wish to take the example seriously, I would be prepared to concede to Professor Stewart that, *in general*, where  $\alpha$ 's proposal to  $\beta$  involves a threat to do a legal wrong to  $\beta$ , this—independent of my situational monopolist test—might properly be viewed as rendering the proposal coercive. However, even here, I am more tentative than Professor Stewart. I give the example in my book, modifying a well-known slave example from Nozick where, in the modified circumstances, the slave holds up his owner at gunpoint one night and demands his freedom, to which the owner agrees.<sup>28</sup> Should we enforce this agreement despite the fact that the slave may be violating the existing law in committing a tort or a crime, on the grounds that these are unjust laws in this context, and that he has not violated the slave-owner's moral baseline? In this case, we might well wish to enforce the agreement.

More generally, Professor Stewart's argument—that the best account of coercion for the purposes of contract law is one that holds that  $\beta$ 's act or promise was obtained by coercion only if  $\alpha$ 's proposal contained a threat to do a legal wrong to  $\beta$ —is an extremely "thin" or impoverished theory of coercion, in that it will only readily apply to a very small range of the standard contractual coercion cases. In most of them (outside the gun-at-the-head type of cases),  $\alpha$ 's proposal to  $\beta$  does not involve a legal wrong. For example, in the classic tug and foundering ship case, the tug owner's proposal to rescue the ship but only in return for an extravagant salvage fee entails no legal wrong on the part of the tug owner to the foundering ship owner and crew. Moreover, the argument does not readily address the lecherous millionaire example that seems to concern Professor Stewart, nor does it readily address the

---

<sup>28</sup> Trebilcock, *supra* note 2 at 80; R. Nozick, "Coercion" in S. Morgenbesser, P. Suppes & M. White, eds., *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* (New York: St. Martin's Press, 1969) 440 at 450.

starving peasant and the competitive rice merchant example, which he also seems concerned about.<sup>29</sup> With respect to this latter example, he says that, “[a]ssuming that the [s]tarving [p]easant’s situation is properly described as one of unfreedom, and that we should do something about it, Trebilcock’s approach does not seem helpful.”<sup>30</sup> I would argue the same for Professor Stewart’s approach. Moreover, I am not prepared to assume that the starving peasant situation should be described as one of unfreedom or that the competitive rice merchant’s contract should be viewed as coercive. I feel quite comfortable about the prospect of enforcing this contract on much the same basis that Professor Stewart feels comfortable in enforcing the competitive grocer contract.<sup>31</sup> Thus, of all the various examples that he is concerned with, the only one that his legal wrongdoing test would reach that my test would not is his quaint altruistic robber case, and even then it would leave many other objectionable cases of coercion unaddressed. It is true that he suggests that, “at a minimum,” the test of legal wrongdoing should be adopted.<sup>32</sup> However, rather like his unspecified additional considerations that might be relevant in resolving the surrogacy case with respect to commodification, Professor Stewart is notably unforthcoming as to what additional tests or considerations might properly be invoked to resolve coercion cases that do not fall under this legal wrongdoing test. It is not obvious to me that this constitutes conceptual progress.

#### IV. PETER BENSON, “THE IDEA OF A PUBLIC BASIS OF JUSTIFICATION FOR CONTRACT”<sup>33</sup>

Of all the commentators in this volume, Professor Benson presents, by far, the most comprehensive and ambitious set of reactions to my book, particularly with respect to the foundational theoretical perspectives on contract law. I have found his comments the most difficult to deal with for two reasons. First, he offers so much by way of incisive and, indeed, decisive critiques of existing normative theories of contract, but on the other hand, in suggesting an alternative theoretical

---

<sup>29</sup> Stewart, *supra* note 23 at 266-69.

<sup>30</sup> *Ibid.* at 268.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.* at 270.

<sup>33</sup> (1995) 33 Osgoode Hall L.J. 273.

framework for viewing contract law, he offers so little that is concretely constructive.

As to my first level of response, Professor Benson offers a dazzling synthesis and critique of the major efficiency, autonomy, and welfare-based theories of contract law. His description and evaluation of these theories is a *tour de force*, and I agree with almost all of his analysis. My only (self-interested) concern is that his treatment is so clear and compelling that it probably makes reading the more laboured treatment of these issues in my book dispensable for many readers, although the same cannot be said for the applications of the competing theoretical frameworks to particular problematic issues in contract law (an issue to which I will return in a moment).

Having so devastatingly critiqued all the major extant theories of contract law, Professor Benson naturally must then confront the awesome challenge implicit in his critiques—that of offering an alternative normative theory of contract law that is not vulnerable to the criticisms he has so effectively brought home to existing theories. Here, the paper understandably is much less satisfying in that it barely begins to sketch what such an alternative theory—what Professor Benson calls a public basis of justification for contract—would look like, obviously presaging further work on his part in this area. In approaching this task, his strategy is to discern a set of minimalist and non-controversial features of contract law (“the immanent structure?”), such as the distinction between nonfeasance and misfeasance and the award of expectation damages for breach of contract, and to extrapolate from this set of core features and the values that inhere in them (a particular conception of human autonomy or human agency) the doctrinal implications for all the major areas of contract law.<sup>34</sup> In contrast to the approach I adopted in my book, Professor Benson does not move from his theoretical premises to their application to particular doctrinal or other concrete contractual issues. The result is that we have no way of evaluating how persuasive we might find the logic behind either the selection of the foundational premises or the detailed set of doctrinal implications claimed to flow logically from those premises.

However, at this point let me register a tentative note of scepticism about this enterprise. First, I am concerned about the general methodological approach employed: Professor Benson’s normative theory of contract is derived by observing what contract law currently is, at least in its most fundamental structural features. Thus prescriptions will presumably be offered on the form that particular doctrines might

---

<sup>34</sup> *Ibid.* at Part IV.

take, or according to which resolutions of particular contractual controversies are appropriate. As with Professor Ernest Weinrib's approach to tort law,<sup>35</sup> which clearly parallels the approach Professor Benson seems to suggest in developing a new normative theory of contract law, I am puzzled by what appears to be something of a naturalistic fallacy: by positively observing certain features of existing contract law, normative implications can be derived by formulating detailed doctrinal rules that allegedly "cohere" with the fundamental premises in some internally rational or logical framework. I have argued that Professor Posner, for example, has been guilty of this sin in developing an efficiency thesis of the common law.<sup>36</sup> When he looks at the common law, including the law of tort and contract, he observes rules everywhere that appear to reflect efficiency considerations and thus, in the light of this normative value, he seeks to explain all detailed doctrinal rules. However, this opens up significant room for controversy as to what one observes even when looking at a minimalist set of structural features of an area of law like contracts, and the values that might be said to inhere in these features. Moreover, Professor Posner has been relatively cavalier in moving from positive observations about the efficiency of particular features of the common law to offering normative prescriptions for reformulating rules that do not appear to accord with an efficiency perspective. That is, he moves from the positive to the normative and commits, in my view, the naturalistic fallacy. I am not sure whether Professor Benson, starting from a different set of premises, will be able to avoid the same dangers.

Second, implicit in both Professor Weinrib's work on tort law and in the approach that Professor Benson suggests should be taken in developing a new normative theory of contract law, is an assumption about what constitutes, in the present case, contract law. Just as Professor Weinrib regards alternative accident compensation and regulatory schemes as outside the purview of his analysis, which focuses entirely on deriving an internally consistent set of tort doctrines from the immanent form and structure of tort law, and just as he regards questions of whether tort law should be displaced by alternative compensation and regulatory regimes as "political" decisions about which he has nothing to say, Professor Benson appears to be assuming a

---

<sup>35</sup> See, for example, E.J. Weinrib, *The Idea of Private Law* (Cambridge, Mass.: Harvard University Press, 1995).

<sup>36</sup> R.A. Posner, *Economic Analysis of Law*, 4th ed. (Boston: Little, Brown & Co., 1992); M.J. Trebilcock, *The Common Law Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1986) at 391-407.

domain for contract law where a similar maneuver is possible. However, in most areas of contract law, we observe a complex mix of common law doctrine, statutory rights and obligations, regulatory constraints, and the like. What part of contract law is he purporting both to explain and to provide a normative justification or theory for, and what part of the whole body of law that impacts on contractual relationships falls outside his domain of inquiry? With respect to those areas of contract law that fall outside his domain of inquiry, what normative benchmarks, if any, can properly be brought to bear in evaluating the wisdom of existing or proposed legislative or regulatory policies, or are these simply "political" decisions about which we as scholars have nothing useful to say?

Moreover, even within the more limited domain of inquiry that Professor Benson appears to implicitly assume, I have yet to be persuaded that his approach will yield the clear doctrinal implications that he foreshadows from his austere set of structural premises. For example, in his discussion of mistake and frustration, he argues that a public justification for contract law, unlike an economic approach that would ask prospectively how the parties, as rational persons, would have wished to allocate the risks in order to maximize the mutual gains from trade, the public justification would be retrospective and would seek to uncover the actual allocation of risks that was established by the parties' consent, explicitly or implicitly. This approach, similar to that adopted by Professor Triantis, who writes from a law and economics perspective,<sup>37</sup> seems to assume that all contracts are complete, contingent-claims contracts and that there is no such thing as an incomplete contract, *i.e.* a contract with gaps where particular contingencies have simply not been addressed at all, either explicitly or implicitly, by the parties. As I have suggested earlier in my rejoinder to Professor Craswell, I find this claim to be so extreme as to be implausible. Moreover, it invites a rather sterile exercise in semantics where courts, in the guise of interpreting the express or implied intentions of the parties will, as in the earlier history of the doctrine of frustration, imply terms that allocate the risk in question by reference to the implicit intention of the parties. The intention or consent of the parties, however, is superfluous to this enterprise and is nothing more than a judicial cover for supplying the missing terms in the contract. With regard to what these missing terms should look like, once one abandons the unrealistic assumption that a particular set of terms has been explicitly or implicitly consented to, one is in the kind of realm that I explore in constructing a set of background terms or default rules on

---

<sup>37</sup> Triantis, *supra* note 6.

some rough-and-ready welfare judgments, leaving the parties to contract *ex ante* around these rules if they choose (thus leaving room for the vindication of autonomy values). Thus, I am sceptical that Professor Benson's analysis will, ultimately, enable him to avoid these kinds of welfare judgments.

My scepticism is intensified when I review earlier writing by Professor Benson in this area. In his article "Abstract Right," he argues that the common will evidenced by two parties to a contract, and reflecting the free and equal moral personality to which each is entitled simply by virtue of being human, leads to an inference that only equivalence in exchange fully respects their equal individual autonomy.<sup>38</sup> In measuring the equivalences of goods or other resources exchanged, he proposes that prices in reasonably competitive markets be used as a basic reference point. But what are these prices? They prices reflect the aggregation of preferences by both suppliers and demanders in these markets, and essentially provide what economists would regard as a welfare measure of value. Thus, economists are likely to see Benson's concept of equivalence in exchange (or Gordley's theory of equality in exchange)<sup>39</sup> as centrally derived from a welfare measure. It is difficult for me to see how such measures can be squared with any purely internal theory of individual autonomy. Moreover, while attracting endorsements from the "right," it will attract criticisms from those on the "left" who view market prices as a bizarre normative benchmark, reflecting (as they do) endogenous preferences, inequalities in prior endowments, and historical, institutional, and political contingencies. How Professor Benson plans to steer between Scylla and Charybdis is something we will await with interest in his future work.

#### V. GILLIAN K. HADFIELD, "THE DILEMMA OF CHOICE"<sup>40</sup>

Professor Hadfield's comments take seriously my scepticism about the convergence claims often made on behalf of private ordering—that they simultaneously promote autonomy and welfare, and explore the implications of a lack of convergence between the two from a feminist perspective. Most of what she has to say I agree with.

---

<sup>38</sup> Benson, *supra* note 27.

<sup>39</sup> Gordley, *supra* note 27.

<sup>40</sup> (1995) 33 Osgoode Hall L.J. 337.

However, let me note one point of disagreement and then extend her insights in a couple of directions.

While I certainly believe, and claim in my book, that autonomy and welfare sometimes diverge, I do not make the much stronger claim that they always diverge which, in relation to the experience of women, Professor Hadfield comes close to accepting when she states that “choice promotes [a woman’s] autonomy on the one hand but diminishes her welfare on the other.”<sup>41</sup> Even in the problematic cases for feminists which she and I focus on—such as surrogacy, separation agreements, and prostitution—the claim that choice promotes a woman’s autonomy but simultaneously diminishes her welfare requires clear identification of the alternative courses of action available. Even in these very difficult contexts it is not obvious to me that, in the great majority of cases, choice reduces a woman’s welfare relative to the other options available to her. It is, of course, entirely legitimate to decry the absence of a richer menu of non-demeaning and self-fulfilling life choices in many of these contexts and to advocate public policies that would enlarge the choice set. However, amongst these policies, the prohibition of the problematic activity, standing alone, seems unlikely to increase women’s welfare, while clearly constraining their autonomy. This is also true of a number of other related contexts on which Professor Hadfield does not directly comment, such as decisions by women to give up their babies for adoption or to have an abortion. These are often anguishing decisions made in contexts where the feasible alternatives are extremely constrained, and where, in some cases, these decisions will be followed regretted subsequently. However, in the absence of empirical evidence that these choices in most cases are subsequently regretted relative to the feasible alternatives, the fact that in some cases these decisions may be subsequently regretted hardly provides a basis for a generic prohibition. Thus, I believe that Professor Hadfield sets up the dilemma of choice too starkly.

I have claimed above and argue more fully in my book that prohibition, standing alone, will almost never have the effect of enlarging the available choice set for women. I say “almost never” because I think there are some cases where prohibition, in the long run, may have this effect. For example, the passage of the factories acts and related legislation in Britain in the first half of the nineteenth century,<sup>42</sup> which prohibited children under a certain age from working in mines

---

<sup>41</sup> *Ibid.* at 341.

<sup>42</sup> See, for example, *An Act to amend the laws relating to labour in Factories*, 1844 (U.K.), 7 Vict., c. 15.



and factories, may well have diminished their welfare and that of their families in the short term, but arguably provided an important political impetus in the longer term for the development of a public and universally accessible system of primary and, later, secondary schooling. One would similarly need to ask, in the contexts with which Professor Hadfield is concerned, whether prohibition of, for example, surrogacy contracts, separation agreements, or prostitution, might set in motion a longer term political dynamic ultimately leading to the adoption of public policies that would significantly enlarge women's life choices. I am somewhat sceptical that political constituencies immediately affected by such prohibitions are likely to be sufficiently salient as to significantly change or intensify the political dynamics favouring the adoption of other choice-enhancing public policies, for example, in the domain of education, the workplace, child-care, or social welfare policy. Of course, many women and men will favour the adoption of choice-enhancing public policies in these areas, but it is not clear to me how the prohibition of problematic activities, such as surrogacy or prostitution, is likely to represent a useful first step in a political strategy directed to these ends.

Having said this, I am acutely sensitive throughout the book to the vulnerability of women in making choices in contexts where both the immediate relational setting and larger historical and social forces often imply high degrees of subjugation, subordination, and dependency. However, my response to these concerns is to attempt to identify legal or regulatory mechanisms that strengthen and protect the choice processes, without removing altogether the ability of women to ultimately choose for themselves, provided these procedural protections are satisfied. Thus, in the separation agreement context, I propose a sixty-day cooling-off period after the signing of a separation agreement, a requirement of independent legal advice, and an ability on the part of either party to such an agreement to challenge the agreement subsequently before a court on grounds of unconscionability, if the agreement generates substantially inferior net benefits for that party relative to those that could have been obtained under an appropriately structured set of default rules. Similarly, in the case of surrogacy, I would allow the so-called surrogate mother the right to opt out of the agreement within a short period after giving birth to the child, thus applying rules similar to those governing the revocation of consent in adoption cases, rules that apply in many jurisdictions around the world. However, removing the possibility of choice altogether, as prohibition would, runs the serious risk of infantilizing women through a new form of paternalism or parentalism, and undermines the strong claim to autonomy that women

have fought so fiercely and bravely for in other contexts, such as access to abortion and contraception.

This is not to claim, of course, that any set of procedural protections that might be devised to strengthen the choice process can ever ensure that there will not be cases of subsequent regret or a reduction in women's welfare as a result of prior choices that have been made. This is true of all individuals who face important and difficult decisions in their lives, such as educational and career options, marriage, and so on. Nevertheless, there is a subset of decisions that women alone sometimes face where special concern seems to me to be warranted. These concerns are exemplified in several recent high-profile and widely discussed decisions of the House of Lords<sup>43</sup> involving the doctrine of undue influence. The basic fact pattern in these cases involves a wife consenting to a mortgage on the matrimonial home in favour of her bank or other financial institution to secure indebtedness of the husband, typically incurred in his business, where the business subsequently fails and the bank seeks then to enforce the mortgage against the matrimonial home. Cases such as these have typically involved traditional marital relationships, with a fairly sharp division of labour between husband and wife, where the wife usually defers to the husband in most business and financial matters and is, in turn, dependent on his income-generating activities. In such contexts, the parties to the agreement often have interdependent, as opposed to independent, utility functions; that is, the welfare of the other party to the agreement significantly matters to the first party in addition to, or instead of, the first party's own welfare. In these circumstances, the wife's consent to the transaction may appear suspect. However, this implicitly assumes that the appropriate normative benchmark for autonomous or genuinely consensual decision making is an arm's length, impersonal, non-affective relationship, and that self-sacrificing or altruistic behaviour, which presumably should often be celebrated and vindicated (as argued by Carol Gilligan),<sup>44</sup> can also often become self-destructive and, if it becomes so, should be discouraged. Framing appropriate legal rules in this kind of context is thus extremely difficult. One might, for example, require the bank or financial institution to fully explain the terms of the security arrangements to the wife. One might insist further that this be done in the absence of the husband. One might

---

<sup>43</sup> *Barclays Bank v. O'Brien* (1993), [1994] 1 A.C. 180 (H.L.); *C.I.B.C. Mortgages v. Pitt* (1993), [1994] 1 A.C. 200 (H.L.). See also *National Westminster Bank v. Morgan*, [1985] 1 A.C. 686 (C.A.).

<sup>44</sup> *In a Different Voice: Psychological Theory and Women's Development* (Cambridge, Mass.: Harvard University Press, 1982).

go further and require that the financial institution insist that the wife obtain independent legal advice. Or one could go further still and prohibit financial institutions from entering into arrangements where the legal or other advice recommends that the wife not enter into the transaction. Some feminists take the view that any rule short of the last option reflects a formal notion of equality that will be insensitive to power imbalances that often afflict these relationships, rendering many of these procedural protections largely empty gestures.<sup>45</sup> However, as in the other contexts discussed above, I am sceptical of altogether removing from women the ultimate ability to choose and, indeed, to do so for self-sacrificial or altruistic reasons, if they are so inclined. While it would seem prudent for the law of contracts to insist on some procedural protections in these cases, it is difficult for me to see how these protections should extend beyond requiring independent legal advice to requiring that it must be followed. To go further would be tantamount to a prohibition and would, again, fail to take women's autonomy seriously.

Finally, let me re-emphasize a recurring refrain of mine throughout my book: we should not ask the law of contracts to carry all the freight for vindicating every important social value or every important public policy objective. Governments have a rich array of policy instruments available to them, and devising an appropriate institutional division of labour so that instruments and objectives are appropriately matched seems, to me, to represent one of the major policy challenges of our time.

---

<sup>45</sup> See, for example, D. Otto, "A Barren Future? Equity's Conscience and Woman's Inequality" (1992) 18 *Melb. U.L. Rev.* 808.

