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SELF-PATERNALISM IN THE MARKETPLACE

Bailey Kuklin*

The invisible hand theory of the market assumes that persons are fully informed, rational actors.¹ Rationality is central also to the law. The law ascribes responsibility only when acts or actors meet certain minimum conditions of rationality. Just as market theory normally assumes the rational economic-person, the law normally assumes the rational legal-person. Each conceptual person is insufficient to base a realistic economic or legal theory upon, and each contains conundrums. One of the conundrums arises from the asymmetries among the different actors in the marketplace, and it is the consequence of these asymmetries which are the topic of this paper.

In another paper, I analyze the conditions of legal responsibility as exemplified by the different actors in the marketplace involved in a hypothetical, occasional purchase of a home appliance.² While I conclude that neither the consumer nor the merchant satisfy strong conditions of legal responsibility, the merchant usually comes substantially closer than the consumer.³ There is, in short, asymmetrical rationality in the overlapping arenas of legal and economic interactions. This asymmetry is inherent to the typical circumstances of the marketplace.

One may question whether the merchant has a proper moral claim to the advantage of the inherent asymmetry. Often the merchant, driven by economic incentives, intentionally exacerbates existing sources of consumer irrationalities, or creates new ones, as by means of advertisements, devoid of relevant information, which hinge upon the fame or sexual appeal of the spokesperson. The merchant's moral claim to the advantage of this asymmetry is even more problematic when it is actually imposed on the consuming public. Upon close inspection the invisible hand operates neither fairly nor, it seems, efficiently. Insofar as this is the case, the con-

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1. See, e.g., ALLEN E. BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* 14 (1985). For an argument that the "invisible hand" of Adam Smith's vision is not as invisible as is usually assumed today, see Brian P. Malloy, *Invisible Hand or Sleight of Hand? Adam Smith, Richard Posner and the Philosophy of Law and Economics*, 36 U. KAN. L. REV. 209 (1988).

2. See Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893 (1990).

3. The term "merchant" is often used in this article as shorthand for merchant, producer, manufacturer, service provider, etc.

sumer may be justified in countering her disadvantage through private action or the invocation of government action. The aim of this article is to give voice to the moral claims of the consumer, merchant, and other interested parties in light of promising countermeasures by the consumer designed to offset the apparent inefficiency and the asymmetrical conditions of legal responsibility in the marketplace.

Before proceeding to the main task, I shall summarize my prior analysis of the conditions of legal responsibility and the conclusions drawn from applying it to the marketplace. This article picks up at the point where the consumer contemplates responses to the asymmetry. The rational consumer, realizing she is unavoidably disadvantaged once she enters the current marketplace, would consider means to prevent this prior to entering. Her motivation is to protect herself, not to protect others — self-paternalism, not paternalism. This response by the consumer is a major focus of this article. The consumer will ponder private self-paternalistic solutions, such as individual tactics or privately administered, concerted action. Unfortunately, these tactics are insufficient to the task of readjusting one's relative power in the marketplace.

As a response to this imbalance in power, the consumer must consider government intervention by regulation. Useful self-paternalistic regulations, however, have economic and moral spillover effects, most obviously on the merchant, but on others as well. These spillovers are addressed in a "neutral dialogue" as espoused by Bruce Ackerman. Hypothetical interested parties express their views in a regulated moral conversation. While the dialogue may silence the self-regarding objections of the merchant, the claims of the other parties are more insistent. In the end, these claims cannot be silenced entirely, especially when the problems of government intervention are judged by the same criteria of rationality on which the consumer's original justification for intervention is based. Consequently, especially in light of the interests of third parties, society must proceed cautiously in readjusting the asymmetries between the consumer and the merchant.

I. RESPONSIBILITY

The question of whether to hold an actor legally or morally responsible directs attention to both the antecedent choice and the consequent act. First, though various labels are used for this and the other notions discussed, the standard for the choice may be characterized in terms of autonomy. A responsible choice turns on the actor's autonomous decisionmaking. For example, decisions

made in total ignorance or under undue influence fail this test. They do not reflect the actor's independent will. Second, the act ensuing from the choice must be a product of the actor's willpower. An irresistible impulse, for example, is not an act in an appropriate sense. Only an autonomous decision linked to a willful act is voluntary, thus giving rise to responsibility.

For a choice to be autonomous, it must satisfy two categories of conditions: knowledge and capability. These two categories are further subdivided. First, knowledge consists of information and foreseeability, that is: (i) data regarding the state of affairs and, (ii) suitable predictability of the consequences of contemplated acts. If one must shoot in the dark, ignorant of either the factual circumstances or the possible results, the act is not reflective of the person, and, therefore, one does not deserve the benefit or burden of the outcome. Second, capability consists of reason and sense, that is: (i) the ability to utilize data to draw sound factual and probabilistic conclusions, and (ii) normative judgment or values that are minimally acceptable. Upon becoming fairly informed of the present and the potential future, one must be capable of using the knowledge adequately to strive in an allowable manner for socially permissible purposes. In sum, autonomy requires both knowledge and capability.

In the marketplace, both the merchant and the consumer fall short of the ideals of the invisible hand and full responsibility. There are various ways to analyze these imperfections. In discussing them in my prior paper, I advanced the polar perspectives of whether the distortions are inherent or imposed, or internal or external. I offered also a typology of distortions, extensively documented by the social sciences, which uses the labels framing, heuristic, environmental, and semantic. Although these eight terms do not have self-evident meanings, they need not be detailed here. What is important is the fact that the imperfections in the marketplace are substantial and imply inefficiency because persons are unlikely to move resources to higher states of utility insofar as their acts are not fully rational. Though neither the merchant nor the consumer is in a position to be completely rational in a strong sense, the usual situation gives the merchant an inherent advantage (e.g., the economies of scale) which it may intentionally enlarge (i.e., by imposing distortions on the consumer's decisionmaking as by advertising ploys). This suggests that unfairness may go along with the inefficiency.

Given this state of affairs, the consumer must face the conclusion that, once she is in the marketplace, she is relegated to bargaining

under circumstances of inherent and imposed disadvantage. This disadvantage stems from an asymmetrical rationality or disparity in the satisfaction of the conditions of responsibility between her and the merchant. The consumer's resistance to the disadvantage is not unfair because there is no *prima facie* right of the merchant to reap its advantage. The rational consumer will ponder methods to rectify this. The rectification, of course, must itself be reasonable and sensible. The solution must avoid primary and secondary effects that exacerbate the irrationalities, perhaps causing greater inefficiency. Furthermore, it must be fair. Fairness must be emphasized, because, otherwise, the consumer's position merely boils down to the point that it is rational for one to maximize one's utility. This is rejected out of hand as an inadequate moral grounding which ignores claims of right.

The consumer who intends to surmount the differential rationality must clear substantial hurdles. Though she enters the marketplace armed with a general awareness of her disadvantages and a strengthened resolve to overcome them, many of them will inevitably persist. Their very nature prevents complete mastering even by the most single-minded, rational consumer. Some elements of the differential, such as access to information, are not simply matters of resolve and clear thinking which can be coped with once one is in the marketplace. For example, the cost of obtaining equal information may be too great to rationally incur in light of the value of the goods in question. Because of these costs, it may be better for the consumer to protect herself through restructuring the rules of the game. This revision may involve the imposition of rules that protect the consumer by restructuring her freedom to act — the restrictions would be self-paternalistic.

II. THE NATURE OF SELF-PATERNALISM

The rational consumer, realizing that once she enters the marketplace she will be unavoidably and unfairly disadvantaged, would consider restructuring the marketplace *ex ante* to level the playing field. She may trade off beforehand part of her claim to freely bargain, as by mandating certain contract term offerings, thereby limiting her own subsequent choices or formal freedom in order to

increase her material freedom.⁴ This is not a paternalistic ploy on her part, rather it is self-paternalistic.⁵

4. The conceptual distinction between material freedom (freedom in fact) and formal freedom (freedom in principle), under various labels, is not new. Weber noticed it. See MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* 188-91 (Max Rheinstein ed., 1954); MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 184-86 (Talcott Parsons ed., 1947). Dewey wrote in terms of "real" and "formal" freedom. See MORTON G. WHITE, *SOCIAL THOUGHT IN AMERICA* 101-02 (1949). Rawls and Hart similarly distinguished between the existence of liberty and the worth or value of it. See JOHN RAWLS, *A THEORY OF JUSTICE* 204-05 (1971); H.L.A. HART, *Are There Any Natural Rights?*, in *POLITICAL PHILOSOPHY* 53, 53 n.2 (Anthony Quinton ed., 1967). Feinberg discussed the distinction between *de jure* and *de facto* autonomy, sovereignty, liberty, and freedom. See JOEL FEINBERG, *HARM TO SELF* 31-44, 62-66 (1986) [hereinafter FEINBERG, *HARM TO SELF*]; Joel Feinberg, *Autonomy, Sovereignty and Privacy: Moral Ideas in the Constitution?*, 58 *NOTRE DAME L. REV.* 445, 461-64 (1983) [hereinafter Feinberg, *Autonomy*]. For example, *de facto* autonomy is "[t]he actual condition of self-government", while *de jure* autonomy is "[t]he sovereign right of self-government." FEINBERG, *HARM TO SELF*, *supra*, at 65 (Diagram 19-1).

The political right has disputed the distinction in order to counter arguments related to mine. See, e.g., John Gray, *Hayek on Liberty, Rights, and Justice*, 92 *ETHICS* 73, 75 (1981). For an argument that the distinction may be a confusion between "liberty" and "power," "ability" or "option," in other words, between negative and positive liberty, see James M. Buchanan & Loren E. Lomasky, *The Matrix of Contractarian Justice*, *SOC. PHIL. & POL'Y*, Autumn 1984, at 12, 17; Michael E. Levin, *Negative Liberty*, *SOC. PHIL. & POL'Y*, Autumn 1984, at 84, 84-88; Jan Narveson, *Equality vs. Liberty: Advantage, Liberty*, *SOC. PHIL. & POL'Y*, Autumn 1984, at 33, 50-52. See generally C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 *U. PA. L. REV.* 741, 775-82 (1986) (describing dispute between conservatives and liberals about conceptions of formal and substantive liberty).

The political far left has also attacked liberals for using the distinction. See, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *MD. L. REV.* 563, 580 (1982) ("merely formal" v. "substantive" freedom). I plead guilty and accuse the Critics of improperly throwing stones. For a look into their glass house, see, e.g., ROBERTO M. UNGER, *KNOWLEDGE AND POLITICS* 187 (1975); Kennedy, *supra*, at 621 (using idea without label). The key question, arguably, is whether the distinction is meaningful and useful and not only a fashionable rhetorical device to hide special pleading. Nor, to satisfy this standard, must the distinction answer all criticism. What normative theory does?

5. Calabresi anticipated this line of reasoning. Discussing products liability he noted:

People in some ways like to protect themselves against themselves. We may not like this, but it is a recurring phenomenon. . . . There is at least one sense in which a system of liability rules may be this kind of thing, a protection designed at a calm moment. When I go into a polling booth I may not want all people to have to do certain things. But I may want them to force me, perhaps, to buy medical insurance, even though as a result I force other people who may not want it. The majority of us require this because we find it necessary to protect ourselves against a later moment when the trip to Florida looks like an awfully good idea.

Edited Transcript of AALS-AEA Conference on Products Liability, 38 *U. CHI. L. REV.* 117, 135-36 (Henry G. Manne ed., 1970) [hereinafter *Transcript*] (comments of Guido Calabresi); see also BRIAN BARRY, *POLITICAL ARGUMENT* 72-74 (1965) (discussing invocation of state to help oneself modify one's own taste or character); GUIDO CALABRESI, *IDEALS, BELIEFS,*

The concept of self-paternalism is the crux of this article.⁶ To advance the main thesis, self-paternalism must first be delineated, defended and distinguished from paternalism.⁷ Basically, self-pater-

ATTITUDES, AND THE LAW 12-13 (1985) (recognizing role of self-paternalism in tort law). Calabresi is "not quite sure how you handle this . . . It is not that these people are incompetent; it is that they themselves will vote to protect themselves against a subsequent incompetence." *Transcript, supra*, at 136. I hope to point towards ways to handle this.

6. Self-paternalism is also called, among other things, precommitment, self-command and self-management. One of the leading commentators, having written on the topic numerous times, is the economist Thomas Schelling. "When the values that govern one's preferences are liable to displacement by values that one deprecates, we need in addition [to decision theory] something that we might call command theory — the theory of self-command, or self-management." Thomas C. Schelling, *Ethics, Law, and the Exercise of Self-Command*, in 4 THE TANNER LECTURES ON HUMAN VALUES 43, 47 (Sterling M. McMurrin ed., 1983) (emphasis and footnote omitted) [hereinafter Schelling, *Ethics, Law, and Self-Command*]. Schelling includes among the familiar cases calling for self-command: "the person [who] just doesn't seem to be all there" (e.g., getting up in the morning); overstimulation or exhilaration; passion or infatuation; capture or captivation; phobias, panic, and extreme terror; and, perseverance. *Id.* at 52-55. Schelling recognized that many consumer problems can be addressed by self-management. See Thomas C. Schelling, *The Intimate Contest for Self-Command*, 60 PUB. INTEREST 94, 112 (1980) (regarding consumer ignorance, budgeting, wise spending and misleading advertising). Precommitment may be rational strategic behavior to cope with conflict, including internal conflict. See THOMAS C. SCHELLING, THE STRATEGY OF CONFLICT 18-19 (1960) [hereinafter SCHELLING, CONFLICT].

John Cirace, an economist-lawyer who kindly commented on a draft of this article, suggested I adopt Schelling's terminology and approach.

[I]t is specifically set in a context of strategic conflict concerning bargains, so it is set in the context of economics in general and game theory in particular; it specifically deals with indeterminate situations; and it has none of the negative baggage associated with the idea of paternalism. . . . Moreover, self-paternalism is self-referential, whereas an irrevocable commitment or precommitment in the context of bargains makes clear that the rationale for the action is not so much to discipline one's self but to keep another from taking advantage of one in a bargaining situation.

Letter from John Cirace to Bailey Kuklin (n.d.). His points are well made. My continued primary reliance on the terminology of self-paternalism springs from the fact that my documentation is largely from the literatures of law and philosophy, which are mainly in terms of self-paternalism and paternalism.

7. The distinction is important for political reasons. The political right obviously has few good things to say about paternalism. *But see infra* note 198. The far left is also critical. See, e.g., Kennedy, *supra* note 4. Kennedy, however, despite his criticism of the "liberal agenda," redressed the agenda into the "respectable" robes of "ad hoc paternalism" and then proclaimed it for the Critics, though cautiously. See *id.* at 624-49. Ultimately, his espousal of paternalism and mine of self-paternalism have significant similarities, see, e.g., *id.* at 640, though I believe self-paternalism is easier to justify, and is fully justificatory irrespective of whether paternalism is a subconscious or hidden motive. See Gerald Dworkin, *Paternalism*, in PATERNALISM 19, 23 (Rolf Sartorius ed., 1983). For other defenders of paternalism, see, e.g., THOMAS C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 24-25 (1983) (discussing "antiexploitative" paternalistic intervention); JOHN KLEINIG, PATERNALISM xi (1984) (arguing that "there is some room in liberalism for paternalistically motivated constraints"); Dworkin, *supra*, at 27-28 ("Paternalism is justified only to preserve a wider range of freedom for the individual in

nalism is the prior restraint of oneself for one's own good,⁸ whereas paternalism is the restraint of another person for her own good.⁹

question."); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 766-97 (1983) (presenting notion of paternalism justified by economic efficiency and distributive fairness, personal integrity, and "notion of sound judgment"); David L. Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519 (1988); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1138-69 (1986) (giving "four basic categories of cases in which interference with a system of private consumption choices is justified . . . sometimes understood as species of 'paternalism'").

8. Elster listed and discussed five (tentative) criteria for self-paternalism:

- (i) To bind oneself is to carry out a certain decision at time t_1 in order to increase the probability that one will carry out another decision at time t_2 .
- (ii) If the act at the earlier time has the effect of inducing a change in the set of options that will be available at the later time, then this does not count as binding oneself if the new feasible set includes the old one.
- (iii) The effect of carrying out the decision at t_1 must be to set up some causal process in the external world.
- (iv) The resistance against carrying out the decision at t_1 must be smaller than the resistance that would have opposed the carrying out of the decision at t_2 had the decision at t_1 not intervened.
- (v) The act of binding oneself must be an act of commission, not of omission.

JON ELSTER, *ULYSSES AND THE SIRENS* 39-47 (rev. ed. 1984) [hereinafter ELSTER, ULYSSES]. He summarized the gamut of discussed strategies of precommitment. See *id.* at 103-05; Jon Elster, *Weakness of Will and the Free-Rider Problem*, 1 ECON. & PHIL. 231, 256-62 (1985); see also George Ainslie, *Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control*, 82 PSYCHOL. BULL. 463, 473-89 (1975) (presenting devices for controlling impulses, with applications); Thomas Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, 74 AM. ECON. REV. (PAPERS & PROC.) 1, 6-7 (1984); Robert E. Scott, *Error and Rationality in Individual Decisionmaking: An Essay on the Relationship Between Cognitive Illusions and the Management of Choices*, 59 S. CAL. L. REV. 329, 342-47 (1986). Even animals precommit themselves. See Jon Elster, *Introduction*, in RATIONAL CHOICE 1, 3 (Jon Elster ed., 1986) [hereinafter Elster, *Introduction*]. Psychologists have discussed precommitment devices in terms of defense or coping mechanisms. Four distinct strategies appear in the literature: extrapsychic devices; control of attention; control of emotion; and private rules. See George Ainslie, *Beyond Microeconomics. Conflict Among Interests in a Multiple Self as a Determinant of Value*, in THE MULTIPLE SELF 133, 144-46 (Jon Elster ed., 1986); see also ELSTER, ULYSSES, *supra*, at 37 (discussing similar alternatives to self-paternalism). The first strategy is embraced here. The effectiveness of the others has been queried: "I would not deny that some degree of self-control can be achieved simply by pulling yourself up by the bootstraps, but as is argued below more durable results are achieved by acting on the environment." ELSTER, ULYSSES, *supra*.

9. Kleinig defined paternalism: "X acts paternalistically in regard to Y to the extent that X, in order to secure Y's good, as an end, imposes upon Y." KLEINIG, *supra* note 7, at 13. For other definitions, see, e.g., Bernard Gert & Charles M. Culver, *The Justification of Paternalism*, 89 ETHICS 199, 199 (1979); Kronman, *supra* note 7, at 763; Shapiro, *supra* note 7, at 522-25. Diverse forms of paternalism are possible: strong and weak, positive and negative, active and passive, and direct and indirect. See KLEINIG, *supra*, at 14. For the idea that paternalism entails neither coercion nor interference with liberty of action, see *id.* at 6-7; Bernard Gert & Charles M. Culver, *Paternalistic Behavior*, 6 PHIL. & PUB. AFF. 45, 45-47 (1976). Overall, legal paternalism, "even when conjoined with other principles, . . . has at best a very limited conception of personal autonomy. Even though it is consistent with the recognition of a person's right of self-determination, it

For the beginning tasks of delineation and distinction, I put the reasoning for self-paternalism into a series of internal monologues. These monologues show self-paternalism in its clearest manifestation, and they demonstrate the ways in which it can verge into paternalism.¹⁰ To draw upon the classic example of self-paternalism, the first internal monologue is ascribed to Odysseus as he muses on what to do about the approaching, irresistible songs of the Sirens. He desires to hear the songs, and yet he knows that, if he does, self-destructive temptations will overwhelm him. In order to solve the quandary, Odysseus, the shrewd one, "peer of Zeus in stratagems,"¹¹ says to himself in a moment of cool reflection: "To safely relish their songs, beforehand I will prevent myself from succumbing to an irrational impulse by ordering my crew to bind me to the mast and ignore my later commands to the contrary."¹² On par-

subordinates that *right* to the person's own *good*." FEINBERG, HARM TO SELF, *supra* note 4, at 57.

10. The borderline between paternalism and self-paternalism is fragile. Feinberg discussed "soft paternalism", which may not be "paternalistic" at all, in any clear sense":

Soft paternalism holds that the state has the right to prevent self-regarding harmful conduct (so far it looks 'paternalistic') when but only when that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not. . . . In the two-party case, . . . [t]o the extent that *B*'s consent is not fully voluntary, the law is justified in intervening 'for his sake'. . . . After all, to whatever extent *B*'s apparent choice stems from ignorance, coercion, derangement, drugs, or other voluntariness-vitiating factors, there are grounds for suspecting that it does not come from his own will, and might be as alien to him as the choices of someone else."

FEINBERG, *supra* note 4, at 12 (emphasis omitted). Kleinig's contrast of strong and weak paternalism is similar: "[A]n imposition is strongly paternalistic if, in order to secure *Y*'s good, *X* imposes upon *Y* without considering *Y*'s capacity to choose that good for him- or herself. It is weakly paternalistic, however, if *X*'s imposition is premised upon *Y*'s incapacity to make that choice." KLEINIG, *supra* note 7, at 14. See also Dworkin, *supra* note 7, at 21 (discussing fact that legislation requiring information to be divulged, e.g., a truth-in-advertising act, is not paternalistic).

11. HOMER, THE ILIAD 40 (R. Fitzgerald trans., Anchor Press/Doubleday eds. 1975).

12. Rational choice may be distinguished from willful action, that is, actor from act. See, e.g., Kuklin, *supra* note 2, at 896-903. Elster, while discussing this classic example of self-paternalism, blurred the distinction when he declares that "Ulysses was not fully rational" since he had "to resort to this device." ELSTER, ULYSSES, *supra* note 8, at 36. That Odysseus "was not fully rational" has been challenged, see David Gauthier, *Morality, Rational Choice, and Semantic Representation*, SOC. PHIL. & POL'Y, Spring 1988, at 173, 207-08 (distinguishing myopic Ulysses (the succumber), sophisticated Ulysses (the self-paternalizer), and resolute Ulysses (the resister)), as has been the implication that Odysseus, while under the enticements of the Sirens, was irrational, see Donald C. Hubin, *Of Bindings and By-Products: Elster on Rationality*, 15 PHIL. & PUB. AFF. 82, 84-85 (1986) ("It is not only our future irrationality we might wish to protect ourselves from, but our future rationality as well."). Self-paternalism, according to Elster, is binding oneself as "a privileged way of resolving the problem of weakness of will." ELSTER, *supra*, at 37.

allel reasoning, a chronic alcoholic upon sober contemplation may vote for declaring incompetent those who enter contracts while under the influence of drugs.¹³ Similar reasoning controls periodically recurring mental illness.¹⁴ Analogous rationales may underlie the law of contracts and the morality of promise-keeping,¹⁵ and even motorcycle helmet and seatbelt laws, among others.¹⁶ In each

13. See CALABRESI, *supra* note 5, at 13. Calabresi expressed concern for the thwarted drunks "who are superb negotiators when seven sheets to the wind [sic]." *Id.*

14. See ELSTER, ULYSSES, *supra* note 8, at 38; JEFFRIE G. MURPHY, *Incompetence and Paternalism, in RETRIBUTION, JUSTICE, AND THERAPY* 165, 176 (1979) (discussing rationally self-chosen "paternalism"); see generally Rebecca S. Dresser, *Ulysses and the Psychiatrists: A Legal and Policy Analysis of the Voluntary Commitment Contract*, 16 HARV. C.R.-C.L. L. REV. 777 (1982). The denial of the right to enter into a self-paternalistic commitment contract, adequately safeguarded, is paternalistic. See *id.* at 783. The key is the adequacy of the safeguards. Dresser doubted they are possible. See *id.* at 826-54.

Rawls extended this reasoning to mental illness in general, and beyond. First, he pointed out that "In the original position the parties assume that in society they are rational and able to manage their own affairs." RAWLS, *supra* note 4, at 248. Then, overlooking the hypothetically self-imposed aspect of the constraints, he expressed the next step in terms of paternalism rather than self-paternalism: "Thus the principles of paternalism are those that the parties would acknowledge in the original position to protect themselves against the weaknesses and infirmities of their reason and will in society." *Id.* at 249.

15. See, e.g., P.S. ATIYAH, PROMISES, MORALS, AND LAW 31 (1981) ("[I]t is important to appreciate — as Hume stressed — that in most cases self-interest renders it desirable that one should be able to bind oneself by giving a promise, and even that one should be threatened with sanctions to compel compliance."); RAWLS, *supra* note 4, at 347 ("The practice of promising exists for precisely this purpose [of gaining the benefit of cooperation from others]; and so while we normally think of moral requirements as bonds laid upon us, they are sometimes deliberately self-imposed for our advantage."). All moral constraints, for that matter, may be principles of rational choice. See DAVID GAUTHIER, MORALS BY AGREEMENT (1986). For criticism, see *Symposium on David Gauthier's Morals by Agreement*, 97 ETHICS 715 (1987); see generally *Symposium on Rationality and Morality*, 96 ETHICS 5 (1985). The relationship between self-command and promise-keeping, including enforceable promises, was analyzed in Scott, *supra* note 8, at 353-61.

16. "[T]here is some evidence indicating that a good proportion of those who fail to wear belts or helmets favor being made to do so." KLEINIG, *supra* note 7, at 85. While Kleinig urged caution in using this finding as a basis for paternalistic intervention, see *id.* at 85-86, Feinberg argued that such restrictions can be seen as nonpaternalistic, see Feinberg, *Autonomy*, *supra* note 4.

One can imagine the support of other types of laws by reasoning with self-paternalistic overtones. For example, take the environmentalist president of a company in a contaminating industry. She prefers to clean up her plant's emissions, but then she would lose market share to dirty competitors and dissatisfy self-interested investors. Legislation mandating the clean-up provides her with the justification to do as she wishes. Even bankruptcy law may be defended in terms of self-paternalism. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1408-10 (1985). According to Jackson, "If individuals cannot control the[ir] impuls[ive behavior] themselves, they may want the assistance of a socially imposed rule [e.g., a nonwaivable right of discharge in bankruptcy], one that will simply enforce the hypothesized decisions of their fully rational selves." *Id.* at 1409. Feinberg discussed self-paternalistic coercive rules of private groups by using the example of the prohibition of anabolic

case, the actor protects herself by establishing self-constraining conditions prior to the time of entering the marketplace, the highway, etc.

The position of Odysseus is similar to that of a consumer reflecting on the differential conditions of responsibility in the marketplace. She knows she must enter the marketplace where its Sirens await. To protect herself against her own irrational decisionmaking, she opts beforehand for constraints.¹⁷ Because she consents to the constraints, she is neither harmed nor wronged.¹⁸ Yet one must restrain the path of this reasoning. When one contemplates the full range of irrational choices, and when restrictions justified as rational self-restraints threaten to become pervasive, self-paternalism begins to take on the appearance of paternalism.¹⁹ At some point, the solil-

steroids by the International Olympic Committee, which ends up making everyone better off once there are assurances that others will conform. See JOEL FEINBERG, *HARMLESS WRONGDOING* 316-17 (1988).

17. Unlike Odysseus who freely chose a market in luxury goods, the consumer must enter the market at least for necessities. Rope and wax are not solutions.

18. See JOEL FEINBERG, *Legal Paternalism*, in *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY* 110, 113-14 (1980). Self-paternalistic restraints, in light of their consent aspect, have been analogized to a contract between one's present and future selves. This contract metaphor must be extended carefully, "for the very simple reason that the two people involved never exist simultaneously. . . . In place of contract, we have the imposition of a rule or constraint on the future self by the present self — the future self never signs on with those rules." Gordon G. Winston, *The Reasons for Being of Two Minds: A Comment on Schelling's "Enforcing Rules on Oneself"*, 1 J.L., ECON. & ORG. 375, 378 (1985). Hence, Winston concluded, a closer analogy is to criminal law where rules are imposed regardless of consent. *Id.* I balk at this last step; it overly dissociates the present and future selves, that is, the psychological connectedness or continuity requisite to personhood, and therefore to autonomous, rational choice. See *infra* note 24. For a discussion regarding present desires with a future object, see generally THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* 27-76 (1970).

But, as the examples in the text reveal, not all consumers actually consent to the self-paternalistic restrictions, some for the very reason that they are irrational. The consent is conjectural, and hence controversial. See *infra* note 23. This consent argument is undeniably a weak link in my chain of reasoning. Some strengthening may result by extrapolating from Coleman's contention that, while a person does not consent to particular losses, as a rational person she would opt for the Kaldor-Hicks criterion at the level of social choice. "The justification of particular losses is a matter of *fairness*, not *consent*. The principle of *consent* would apply to the justification of the institutions, the principle of *fairness* to individual losses." Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 *STAN. L. REV.* 1105, 1127 (1982). The neutral dialogue below addresses the fairness question.

19. Kennedy argued that the motivation of the decisionmaker determines whether an action is distributive, paternalistic or a matter of efficiency. See Kennedy, *supra* note 4, at 570-71. My motives are mixed, being distributive in the promotion of the fortune of those who have been taken advantage of by others; see Kuklin, *supra* note 2, at 1006-07, [self-]paternalistic in the attempt to get myself to act in my own real interests, and, by advancing the imposition of a warranty offering, see *infra* section V at 46, cognitive of efficiency, as Kennedy recognized, see Kennedy, *supra*, at 573. Kennedy acknowledged that some fudging may be required in the distinctions, see *id.* at 573-74, and Kleinig

ogy about self-paternalism should become a dialogue about paternalism.²⁰

To make this clearer, suppose our contemplator muses on contingencies remote from herself. She rarely imbibes to drunkenness, perhaps she never has, but she has seen the state of those who have and realizes that she also would be an easy mark should she overdo it. Therefore, she says to herself in words identical to those of the chronic alcoholic: "To protect myself from irrational decisions when I am inebriated, I opt for the doctrine of legal incompetence for intoxication." The internal monologue is entirely self-interested without a thought to paternalize others who succumb to the liquid drug.

Then our contemplator muses further on decisionmaking in the marketplace. She recognizes that distortions and asymmetries in the marketplace are pervasive. Complications of choice enter nearly every transactional arena, especially those involving risk and uncertainty, but she does not want to create so many new rules that her freedom is overly constrained. While this muses may be a well-educated professional, she realizes the magnitude of the transactional disadvantage she would suffer if she were unable to utilize her well-honed gifts of nature and nurture.²¹ Thus she says to herself: "When I am in the position of being unduly confounded by the

underscored the difficulty of discerning the motives behind consumer protection legislation, see KLEINIG, *supra* note 7, ch. 7. "[P]erhaps the key question concerns whether legislation of a certain kind requires recourse to paternalistic considerations if it is to be justified." *Id.* at 178. Mandatory warranty offerings do not lead inevitably to paternalistic considerations. For more on the motives for government action, see *infra* note 151. Whether the decisionmaker's motives are relevant can be challenged. See G.E. MOORE, *ETHICS* 79-80 (1912) (arguing that motive may be relevant to judgments of whether actor deserves blame or praise, but whether action is right or wrong depends on consequences, never on motive).

20. Struggling with the fuzziness at the margin between paternalism and self-paternalism, Schelling raised the "contractual approach to social obligation" whereby a legislator decides paternalistic questions relating to how much should be required to be spent on seatbelts, smoke alarms, etc., by deciding how much she would spend on these items for herself. THOMAS C. SCHELLING, *Economic Reasoning and the Ethics of Policy*, in *CHOICE AND CONSEQUENCE* 1, 10 (1984). Schelling stated, "The question still may not be easy, but it is less morally intimidating." *Id.* Moral intimidation arises when the legislator realizes that the regulated party does not recognize the net value of the regulation. See Dworkin, *supra* note 7, at 23.

21. For example, installment credit sales in low income neighborhoods are "marked by ignorance on the part of the buyer, enticement, the bait of easy terms, fraudulent practices, shoddy merchandise, unreliable dealers, garnishment and oppressive collection methods." Homer Kripke, *Gesture and Reality in Consumer Credit Reform*, 44 N.Y.U. L. REV. 1, 4 (1969). The consumer's knowledge of the product and the business practices affects her treatment under the Uniform Commercial Code caselaw. See Alan Schwartz, *The Private Law Treatment of Defective Products in Sales Situations*, 49 IND. L.J. 8, 33 (1973).

choices in the marketplace, I now choose to protect myself against my own irrationality by opting for the legal doctrine of unconscionability." Again the monologue is in terms of self-interest, but there is a noticeable difference. The soliloquist has little reason to believe that she will ever be in a position where the current doctrine of unconscionability will apply to her in full force. She is not about to lose thirty points from her IQ and ten years of education.²² Her vote for unconscionability, while applicable across the board, will affect mainly those from socioeconomic classes less privileged than her own. The effect on her is greatly attenuated, and, therefore, the extent of her appreciation of and attention to the repercussions may be questioned. Although her motivation is purely self-paternalistic, because of the unlikely personal impact, her monologue smacks of paternalism. Those for whom the doctrine will have more immediacy will rightfully have something to say about this. Before general consent to the doctrine is supposed, the monologue should become a dialogue with them, otherwise self-paternalism is in danger of becoming paternalism.²³

22. "Socrates can neither recall nor return to the life of the fool . . ." Michael S. McPherson, *Mill's Moral Theory and the Problem of Preference Change*, 92 *ETHICS* 252, 266 (1982). Unconscionability has applicability for even the most gifted, educated, and wealthy, as where it is grossly inefficient to resist a standard take-it-or-leave-it provision involving an event unlikely for her (e.g., a self-help repossession clause).

23. Gewirth discussed this general issue in terms of dispositional or tacit consent: "For a recipient to give dispositional consent means that he would have unforcedly acquiesced in a transaction if he had been aware of the relevant circumstances and had been in an emotionally calm state of mind." ALAN GEWIRTH, *REASON AND MORALITY* 259 (1978). Gerald Dworkin advanced this as a defense of paternalism. See Dworkin, *supra* note 7, at 28-33. See also Dresser, *supra* note 14, at 789 ("Consequently, the only difference between self-paternalism — as represented by the voluntary commitment contract — and true paternalism is that in the former, the individual has consented to the future coercion, while in the latter, the state assumes that he or she would consent if capable.").

Consent arguments can run amuck. One problem with "dispositional consent" is that "the appeal to dispositional consent may be used in a paternalistic way to justify acting on recipients without regard for their actual desires or beliefs or occurrent consent (or dissent)." GEWIRTH, *supra*, at 260. In criticising hypothetical consent arguments, Sagoff insisted they are too far-reaching. See Mark Sagoff, *Values and Preferences*, 96 *ETHICS* 301, 307 (1986). Sagoff wrote, "An advocate . . . might argue that we would surely agree with him, if only our heads were screwed on right." *Id.* Feinberg, in discussing consent arguments, see FEINBERG, *HARM TO SELF*, *supra* note 4, ch. 22, spurned subsequent consent, *id.* at 182-83 ("I would surely have consented"), Rawlsian, hypothetical rational consent, *id.* at 184-86, and, generally, consent as inferred psychological states (silent desires, wishes, etc., as inferred from past behavior or actuarial tables), *id.* at 181. Yet he accepted prior consent, *id.* at 181-82, tacit consent, *id.* at 183-84, and, sometimes, dispositional consent, *id.* at 181. For another discussion of consent-based justifications of paternalism, see KLEINIG, *supra* note 7, at 55-67; see generally Onora O'Neill, *Between Consenting Adults*, 14 *PHIL. & PUB. AFF.* 252 (1985).

To generalize, the complaints against some of the contemplator's conclusions are that she cannot be (e.g., cretinism), or be again (e.g., minority), or is unlikely to be (e.g., unconscionability) in a situation where the imposed restrictions would be of significant value directly to herself. The claimed self-paternalism may be ill-considered or a cover for paternalism. As self-paternalism approaches paternalism, sharp looks askance become appropriate. But before I deal with these raised brows, the concept of self-paternalism must be defended.

III. THE VALUE OF SELF-PATERNALISM

Though self-paternalism may be rational, and while most commentators have mainly good words to say about it, there are reasons for uneasiness. These reasons are discussed in this section.

To focus the criticism and discussion of self-paternalism, assume the consumer is contemplating moderate market constraints, such as a mandatory warranty offering. With this hypothetical as a backdrop, there are ten relevant criticisms of self-paternalistic action.

First, severe restrictions, whether imposed by others or self-imposed, may threaten personhood.²⁴ Given common assumptions about autonomy, the nature of a person is to be free, and to lose that freedom, whether or not later regretted, is to stop being a per-

A related justification for intervention is based upon "retrospective rationality," whereby a policy is pursued "so long as there are good grounds for believing that at the end of the day it will be agreed to have been a good thing." ROBERT E. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 41 (1982). See also Dresser, *supra*, at 789-92 (surveying other justifications, including "Thank You Theory of Paternalistic Intervention"). Elster objected that the coerced person's preferences are being seduced. See ELSTER, *supra* note 8, ch. II.6; but see GOODIN, *supra*, at 52-54 (arguing that seduction objection is weak). Finally, another means to justify apparent paternalism in terms of self-paternalism is to distinguish "true" preferences from "actual" ones. This step has been invoked in defense of utilitarianism. See, e.g., John C. Harsanyi, *Morality and the Theory of Rational Behaviour*, in *UTILITARIANISM AND BEYOND* 39, 55-56 (Amartya Sen & Bernard Williams eds., 1982); J.A. Mirrlees, *The Economic Uses of Utilitarianism*, in *UTILITARIANISM AND BEYOND*, *supra*, at 63, 68-69. For criticism, see ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 131-34 (1969) (presenting idea as "magical transformation, or sleight of hand"); FEINBERG, *supra*, at 162-71 (regarding neurotic preferences); Donald Regan, *On Preferences and Promises: A Response to Harsanyi*, 96 *ETHICS* 56, 56-58 (1985).

24. Of the conditions of personhood may not exist when the precommitment falls due. For example, assuming that psychological connectedness or continuity is a requisite of personhood, see, e.g., STANLEY I. BENN, *A THEORY OF FREEDOM* 162-64 (1988); DEREK PARFIT, *REASONS AND PERSONS* ch. 10 (1984), regarding advance directives for medical care, "the very process that renders the individual incompetent and brings the advance directive into play can — and indeed often does — destroy the conditions necessary for her personal identity and thereby undercut entirely the moral authority of the directive." Allen Buchanan, *Advance Directives and the Personal Identity Problem*, 17 *PHIL. & PUB. AFF.* 277, 280 (1988) (emphasis omitted).

son.²⁵ In rebuttal, it should be noted that this argument, smacking of tautology and essentialism,²⁶ appears weak when one considers the basis for giving up this freedom in the context of the marketplace, and the sweep of the freedom rationally relinquished.²⁷ By

25. See, e.g., IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 98 (John Ladd ed., 1965) (1797) ("No man can bind himself by a contract to the kind of dependency through which he ceases to be a person, for he can make a contract only insofar as he is a person."); IMMANUEL KANT, *LECTURES ON ETHICS* 43-44, 124, 165-68 (Louis Infield trans., 1930); CLARENCE I. LEWIS, *The Meaning of Liberty, in VALUES AND IMPERATIVES* 145, 146 (1969). Lewis argued that "Man is born free in the sense that he discovers himself as an individual in discovering that this ability to act by deliberate decision belongs to his nature. . . . He cannot renounce this privilege, and to deprive him of it is to deny him the right of existence as a person." *Id.* Kant had a strict view of this limitation: "It follows that someone can hire himself out only to do work that is specified both as to kind and amount, either as a day laborer or as a 'live-in' servant." KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE*, *supra*, at 98. On the other hand, Kant advocated self-imposed restrictions based upon the moral law. He said, for example, "Freedom and the will's enactment of its own laws are indeed both autonomy — and therefore are reciprocal concepts" IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* *450 (Howard Paton trans., 3d ed. 1956) (1785) (footnote omitted). See *id.* at *431-33. J.S. Mill, the utilitarian, also was concerned about personhood, though this concern is usually grounded in deontology. See JOHN S. MILL, *On Liberty, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 81, 213 (1951) (1859). Slavery contracts defeat "the very purpose [i.e., liberty] which is the justification of allowing [a person] to dispose of himself. . . . The principle of freedom cannot require that he should be free not to be free." *Id.* Mill recognized that the necessities of life limit wide application of this principle. See *id.* Mill's principle appears expansive enough to cover self-paternalism, but for weaknesses in his (and others') reasoning against paternalism that also apply to self-paternalism, see KLEINIG, *supra* note 7, at 156-65 (suggesting that Mill may have compromised his position); Margaret Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849, 1902-03 (1987); see generally Feinberg, *Autonomy*, *supra* note 4. The self-imposed restrictions in issue here seem hardly the type Kant and Mill had in mind and can be rationally justified by the autonomous actor. See *infra* note 29. Radin expressed concerns similar to Mills' in terms of "universal commodification [that] undermines personal identity by conceiving of personal attributes, relationships, and philosophical and moral commitments as monetizable and alienable from the self." Radin, *supra*, at 1905. Therefore, she concluded, "market-inalienability may attach to things that are personal." *Id.* at 1906. The worries in this article are not over personal things. In any event, one must be wary of employing inalienability for paternalistic reasons. See *infra* note 55.

26. G. Dworkin and Rawls discerned this. See Gerald Dworkin, *Paternalism: Some Second Thoughts*, in *PATERNALISM*, *supra* note 7, at 105, 111 ("There is nothing in the idea of autonomy which precludes a person from saying: I want to be the kind of person who acts at the command of others. I define myself as a slave and endorse those attitudes and preferences. My autonomy consists in being a slave."); John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *PHIL. & PUB. AFF.* 223, 232 n.15 (1985) ("It should be emphasized that a conception of the person, as I understand it here, is a normative conception, whether legal, political, or moral, or indeed also philosophical or religious, depending on the overall view to which it belongs.").

27. Feinberg found it consistent with the intentions of the founding fathers that "a free and autonomous person can renounce and relinquish any right [e.g., the right to life], provided only that his choice is fully informed, well considered, and uncoerced, that is to say, fully voluntary." JOEL FEINBERG, *Voluntary Euthanasia and the Inalienable Right to Life*, in *RIGHTS, JUSTICE AND THE BOUNDS OF LIBERTY*, 221, 250-51 (1980)

self-imposing restrictions, one gives up an aspect of freedom in order to enlarge another.²⁸ The freedom one chooses to forego is largely formal and with little material consequence.²⁹ Indeed, the

(emphasis omitted). Nor is the relinquishment of the right necessarily the abdication of autonomy. As Kuflik stated in regard to "autonomy-abdication to protect against self-acknowledged irrationality . . . , insofar as the agent's decision is rationally defensible, it is not actually a decision to abdicate autonomy" Arthur Kuflik, *The Inalienability of Autonomy*, 13 PHIL. & PUB. AFF. 271, 285 (1984). For discussion, see *id.* at 285-96; John Rawls, *A Well-Ordered Society*, in PHILOSOPHY, POLITICS AND SOCIETY 6, 13 (Peter Laslett & James Fishkin eds., 5th series 1979). Even if autonomy is abdicated in some sense, this may be quite justifiable. See, e.g., Nancy L. Rosenblum, *Studying Authority: Keeping Pluralism in Mind*, in AUTHORITY REVISITED 102, 112 (J. Roland Pennock & John W. Chapman eds., 1987) (arguing for deference to experts to efficiently achieve complex technical ends); Joseph Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3, 28-29 (1985) (discussing surrender of judgment to another who has demonstrably better judgment under circumstances: "this surrender of judgment and acceptance of authority, far from being either irrational or an abdication of moral responsibility, is in fact the most rational course and the right way to discharge one's responsibilities."). Wolff pushed this reasoning down the slope: "Indeed, we may wonder whether, in a complex world of technical expertise, it is ever reasonable *not* to [give up one's autonomy]!" ROBERT P. WOLFF, IN DEFENSE OF ANARCHISM 15 (1970). Most recognize limits. See, e.g., Feinberg, *Autonomy*, *supra* note 4, at 475 ("No man can make himself into a mere instrument of another's will. Even an autonomous agent cannot alienate his ultimate accountability [presumably, even if it is rational to do so].").

28. Giving oneself over to another's authority (in this case, one's prior self) is not necessarily a sacrifice of (later) autonomy.

Inclinations toward obedience and submission to authority unquestionably have good effects — one of which is that they make possible the development of the egoistic, autonomous self It would be difficult or impossible to become meaningfully autonomous if we were not inclined to subordinate our own will to the dominant will of someone we trust or respect, [as for example, to a piano teacher].

Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 402 (1985). Obviously, this can go too far. Regarding self-imposed restraints, for instance, West referred to Kafka's "hunger artist" who, exercising an "empty freedom," starved himself to death. "[H]is refusal to compromise the sovereignty of his present desire for pure self-control ultimately denies the welfare — indeed the existence — of his future self." *Id.* at 394.

29. For a discussion of the material and formal freedom distinction, see *supra* note 4 and accompanying text. Facing take-it-or-leave-it contracts, the consumer is usually a "contract term taker," rather than a bargainer. See Victor Goldberg, *Institutional Change and the Quasi-Invisible Hand*, in THE ECONOMICS OF CONTRACT LAW 72, 72 (Anthony T. Kronman & Richard A. Posner eds., 1979). Before going on, one might ask, "What's so hot about freedom?" Feinberg responded that freedom is a good, but only "one kind of good among many." FEINBERG, HARM TO SELF, *supra* note 4, at 65. "The *de jure* autonomous person will surely reserve the right to 'trade off' his *de facto* freedoms for goods of other kinds, as measured on his own scale of values and determined by his own judgment." *Id.* Feinberg rejected the alleged paradox of the morally autonomous person who diminishes his own *de facto* freedom. See *id.* Following Mill and the liberal tradition,

respect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him. . . . A perfectly autonomous person would have in Mill's words the 'power of voluntarily disposing of

effect of foregoing this freedom is to expand one's power in the marketplace and advantageously affect distributions of material wealth. As a practical matter, the overall breadth of the consumer's freedom is increased.³⁰

Second, one may precommit oneself to a plan that later is cause for regret,³¹ not because the commitment was foolish at the time,³²

his own lot in life,' even if that involved forfeiting his *de facto* freedom in the future.

Id. at 68-69 (emphasis omitted). To take the final step against freedom of sorts: "One might argue that having to make decisions on all those items to be consumed is, itself, an infringement of our liberty. As Moore argues, 'A very precious part of human freedom is that *not* to make decisions . . .'" Alan Wertheimer, *Disrespect for Law and the Case for Anarchy*, in ANARCHISM 167, 187 n.22 (J. Roland Pennock & John W. Chapman eds., 1978) (citing BARRINGTON MOORE, REFLECTIONS ON THE CAUSES OF HUMAN MISERY 68-69 (1970)).

30. The risks of limiting one's future options may be overstated: "I offer the personal judgment that, by and large, people are more in need of greater efficacy in devising rules for their own behavior than in danger of shortsighted self-binding activity." Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L., ECON. & ORG. 357, 360 (1985). For discussion of when greater choice may be worse for the individual, see Russel Hardin, *The Utilitarian Logic of Liberalism*, 97 ETHICS 47, 58-62 (1986) (giving example of duel prohibition or coed dormitory curfew); Arthur Kuflik, *The Utilitarian Logic of Inalienable Rights*, 97 ETHICS 75, 86 (1986) (giving example of inalienable right to sue for divorce); see generally SCHELLING, CONFLICT, *supra* note 6. A hint of paradox can be heard: "Placing value on allowing people to make choices — to act free of restraint — leads to placing value on not freeing persons of the consequences of their choices. Freeing them of such consequences would undo the choice and in significant ways would retroactively deprive them of the power of choice." Ian R. Macneil, *Values in Contract: Internal and External*, 78 Nw. U. L. REV. 340, 356 (1983).

31. First, a caveat:

Even in the cases where the person subsequently regrets his choice, he may not regret that he had not been forcibly prevented from making it.

There must be a right to err, to be mistaken, to decide foolishly, to take big risks, if there is to be any meaningful self-rule

FEINBERG, HARM TO SELF, *supra* note 4, at 62. Rawls argued against the rationality of regret or self-reproach, since the actor "does what seems best at the time, and if his beliefs later prove to be mistaken with untoward results, it is through no fault of his own." RAWLS, *supra* note 4, at 422 (presenting "deliberative rationality"). Along these lines, Kronman distinguished between disappointment and regret, disappointment occurring when things do not work out as wished, and regret "[w]hen a person wishes that he had not made a particular contract because his goals have changed . . ." Kronman, *supra* note 7, at 780. Regret, unlike disappointment, often "undermine[s] a person's confidence in the rationality of his own choices," *id.*, and may be especially demoralizing when the person, unable to empathize with his prior values, believes he has betrayed himself, see *id.* at 781-82. As Rawls, under "deliberative rationality," put it: "The person at one time, so to speak, must not be able to complain about actions of the person at another time." RAWLS, *supra*, at 423. Perhaps this is the Golden Rule, but upside down. See Derek Parfit, *Comments*, 96 ETHICS 832, 833 n.3 (1986) ("We ought not to do to our future selves what it would be wrong to do to other people."). Or perhaps it is the Aristotelian mandate "to be a friend to himself." Kronman, *supra*, at 782.

32. On the other hand, it may have been wrong at the time. See Mark Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 785 ("The regretting person does not only claim that he has come to prefer lollipops, but he feels that he latently preferred them all along.").

but because the person changes and no longer has the same preferences or value system.³³ This plan might jeopardize the person's integrity or self-respect.³⁴ While the moderate constraints contemplated here hardly seem to amount to an infringement of the self-paternalizer's personhood, nevertheless, she may later view differently the merits of the precommitment. Yet the consumer's second thoughts, in light of the modesty of the constraints, are unlikely to elevate the regret to the level where it threatens integrity or self-respect.³⁵ For example, who would think of the consumer as less of a person because she must be offered a warranty?

See also id. at 784-87 (discussing neoclassical economic model's failure to account for "wrong" purchase choices). When conflicting with a later decision, the earlier decision may be presumed to be wrong, since "[t]he agent is likely to have more information and to have had more time to reflect on her goals." Donald H. Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM*, *supra* note 7, at 113, 129.

33. Whether or not regretted, preference changes may undermine the value of prior self-commitments. *See generally* RICHARD M. HARE, *MORAL THINKING* 101-06 (1981) (differentiating "now-for-now," "now-for-then," and "then-for-then" preferences). The chooser may become "a different person," *see, e.g.*, PARFIT, *supra* note 24, at 327-29; Regan, *supra* note 32, at 125; R.H. Strotz, *Myopia and Inconsistency in Dynamic Utility Maximization*, 23 *REV. ECON. STUD.* 165, 173 (1955); *but see* FEINBERG, *HARM TO SELF*, *supra* note 4, at 83-87; Elster, *Introduction*, in *THE MULTIPLE SELF*, *supra* note 8, at 1, 13-14; Feinberg, *supra* note 4, at 479-83, and therefore not responsible for prior choices, *see* STANLEY I. BENN & RICHARD S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 240 (1959). Yet identity may not turn on value changes alone, since one's values commonly are in flux and contradiction. *See* GUNNAR MYRDAL, *OBJECTIVITY IN SOCIAL RESEARCH* 16 (1969); Kuklin, *supra* note 2, at 983 n.299; *see also* GOODIN, *supra* note 23, at 41-47 (discussing periodic preference changes); Winston, *supra* note 18, at 377-78 (discussing causes of internal preference conflicts); *but cf.* MICHAEL S. MOORE, *LAW AND PSYCHIATRY* 103 (1984) (arguing that law presumes person's desires are somewhat consistent and transitively ordered over time). Furthermore, if the preferences of the "new" person are given precedence, the "old" person evades the responsibility for her prior voluntary commitments. *See* FEINBERG, *supra*, at 86-87. Whether the reasons for changing one's preferences are good or bad is relevant. *Cf.* Winston, *supra*, at 377 ("Indeed a presumption of a general worsening of preferences is necessary before we can safely side with the present self and promote the success of all its rulemaking over the future self."). The problems are in distinguishing and discerning the reasons. *See* ELSTER, *ULYSSES*, *supra* note 8, at 147-50; Feinberg, *supra*, at 475-79. Behavioral and economic studies of uncertain future preferences have begun. *See, e.g.*, James G. March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, in *RATIONAL CHOICE*, *supra* note 8, at 142 (presenting behavioral study on how preferences are processed in choice behavior); Peter J. Hammond, *Changing Tastes and Coherent Dynamic Choice*, 43 *REV. ECON. STUD.* 159 (1976). Possibly, one may engineer one's preference changes, *see* March, *supra*, at 158-62 (indicating that engineering of choice behavior can be achieved once conceptual and optimization problems are overcome), or develop strategies to cope with them, *see* ELSTER, *ULYSSES*, *supra*, at 72-73. But Kronman, because of the difficulties, rejected the economic analysis which monetizes the risk of change in values. *See* Kronman, *supra* note 7, at 782 n.64.

34. *See* Kronman, *supra* note 7, at 780. For the requisites of self-respect, *see* Joseph Raz, *Liberating Duties*, 8 *LAW & PHIL.* 3, 15 (1989).

35. The dilemmas from preference changes still remain. *See* BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 196-98 (1980) (stating that dilemmas arise in

Third, by restricting beforehand one's foolishness, one may be prevented from fully experimenting and learning from mistakes. The moral fiber exercised by hard-nosed give and take may be inadequately strengthened if there are fewer rounds in the ring.³⁶ Be that as it may, whether one learns from mistakes, or learns in time, or at an undue cost, depends on the situation.³⁷ One must not forget that in the marketplace the match is fixed. The merchant wears weighted gloves. Although a battering now and then may improve the consumer's grit and mettle, regular batterings may simply wear

evaluating whether person who gives his knowing and explicit consent to contract should always be held to its terms even though his preferences have changed). For example, while "free persons conceive of themselves as beings who can revise and alter their final ends and who give first priority to preserving their liberty in these matters," John Rawls, *Reply to Alexander and Musgrave*, 88 Q.J. ECON. 633, 641 (1974), especially since it may be difficult to fully appreciate one's preferences under hypothetical circumstances before one has experienced them, see Frank Hahn, *On Some Difficulties of the Utilitarian Economist*, in UTILITARIANISM AND BEYOND, *supra* note 23, at 187, 191-93 (noting that one may be wrong in evaluation of alternative selves, having never experienced proposed alternative), nonetheless, not second-guessing the precommitment may make it easier for all parties affected, as in regard to that of a patient in *extremis*, see Thomas C. Schelling, *Strategic Relationships in Dying*, in CHOICE AND CONSEQUENCE, *supra* note 20, at 147, 153-55 ("[F]reedom of choice is not always welcome.").

36. Mill mustered this "moral muscles argument" to attack paternalism. See MILL, *supra* note 25, at 156 ("The human faculties of perception, judgment, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice."). See also JOHN S. MILL, PRINCIPLES OF POLITICAL ECONOMY bk. V, ch. XI, § 2 (1st ed. 1848) (arguing that restrictions on individual action "starve the development of some portion of the bodily or mental faculties."); WILLIAM GODWIN, ENQUIRY CONCERNING POLITICAL JUSTICE 276 (K. Codell Carter ed., 1971) (1793) ("As long as a man is held in the trammels of obedience, and habituated to look to some foreign guidance for the direction of his conduct, his understanding and the vigour of his mind will sleep."). For modern versions of this concern, see FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 76-77 (1960) (stating that granting responsibility to citizens for their own actions and interests helps fulfill aim of freedom); KLEINIG, *supra* note 7, at 26-27; Kennedy, *supra* note 4, at 640; Rawls, *supra* note 27, at 13; Regan, *supra* note 32, at 115-16; Malcolm P. Sharp, *Mr. Justice Holmes: Contracts*, 31 U. CHI. L. REV. 268, 276-78 (1964) (discussing objective test in contracts).

37. See Stanley I. Benn, *Persons and Values: Reasons in Conflict and Moral Disagreement*, 95 ETHICS 20, 29-30 (1984) (arguing that while persons are entitled to make mistakes based on their own choices, under some conditions, value-centered reasons justify restricting their pursuit of what they choose). "But we do not learn from all our mistakes, or not without excessive costs being exacted." KLEINIG, *supra* note 7, at 189. After pointing out that required minimum standards for choices do not eliminate mistakes, rather they reduce the likelihood "where those who choose badly would probably suffer disproportionately," Kleinig concluded: "With many items, particularly those that are more expensive, repeat buying is unlikely and the 'lesson' will come too late." *Id.* Schelling doubted the character-building argument in general: "I have heard expressions of concern that struggle builds character and the merchandising of 'instant self-control' will weaken the human spirit. I acknowledge the possibility but cannot help comparing the argument to a similar argument we used to hear against taking the pain out of childbirth." Schelling, *Ethics, Law, and Self-Command*, *supra* note 6, at 71.

her down with frustration, especially when she realizes that she cannot rationally overcome the merchant's advantage once she enters the arena. This is not the type of case where self-paternalism becomes superfluous through experience and practice in the marketplace.³⁸

Fourth, and closely related to the last point, options should be kept open since, "precisely because the cultivation of true moral values and of true virtue depends on self-discipline rather than external discipline, it requires liberty of choice."³⁹ A precommitment calling upon the assistance of third parties may undermine self-discipline and thwart the goals of moral strength and virtue. Along with the response to the last point, two thoughts may be offered against this conclusion. First, the self-imposition of constraints itself, when actively initiated by the self-paternalizer, requires self-discipline. Second, the basic reason the consumer considers precommitments regarding the marketplace is that, once she recognizes the distortions to rational decisionmaking, she does not find all that much material liberty of choice. Greater liberty avails the consumer as she stands back before entering the marketplace. Options at this point, rather than decisions on the tilted playing field, may better cultivate true moral values and true virtue.

38. Cf. KLEINIG, *supra* note 7, at 30-31 ("But we can sometimes overdo the exercise [of our 'moral muscle'] . . ."). The inevitable battering in the unconstrained marketplace may indeed strengthen the consumer's moral muscle even though she wins no matches in that setting. The strength, as suggested by the next point, may serve her in other arenas less one-sided. Insofar as this result is lost, self-paternalism may be costly. I say, "may be costly," because, before lamenting this loss, one should pause to evaluate it. Under one view, "although we could come to resist the techniques of advertisers, it would impoverish us were we to become the sort of person for whom that was easy. We should not be expected to resist them." *Id.* at 187; *see also infra* note 49 (showing societal effects of recognizing certain agreements).

As another scenario, the continual battering may lead to a reaction formation, which "is the setting up of a more-or-less rigid attitude or character trait which will serve as a means of preventing the emergence of a painful or undesirable attitude or trait, usually of the opposite type." ANDREW S. WATSON, *PSYCHIATRY FOR LAWYERS* 167 (rev. ed. 1978) (citation omitted). Or, as implied in the text, the consumer may become enervated from the lost struggles and lose what strength she has. Again, we reach the common complaints that the intuitive possibilities are many, the actual effects are a matter of (unpursued) empiricism, and the promoted values are controversial.

39. Neil MacCormick, *Against Moral Disestablishment*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 18, 22 (1982). "This view, despite its obvious roots in Kantian moral philosophy, is also central to the utilitarian John Stuart Mill's argument in his classical statement of legal liberalism . . ." *Id.* at 22-23 (citing H. L. A. Hart and R. Dworkin for similar propositions). Ironically, moral rules themselves limit freedom, "for moral rules take conduct out of the realm of preference and free decision." Richard E. Brandt, *Toward a Credible Form of Utilitarianism*, in *MORAL RULES AND PARTICULAR CIRCUMSTANCES* 145, 156 (Baruch A. Brody ed., 1970).

Fifth, the Aristotelian principle should be advanced, whereby, "other things equal, human beings enjoy the exercise of their realized capacities (their innate or trained abilities), and that this enjoyment increases the more the capacity is realized or the greater its complexity."⁴⁰ Excitement, the feeling of self-competence, the sense of worthwhileness, and self-respect all flow from the principle.⁴¹ Precommitment may curtail the exercise of these capacities. But the problem is unavoidable in the marketplace. Because its imperfections are beyond the reach of the rational consumer once she is there, the exercise of her capacities is already limited. The consumer, mulling over these conditions of narrowed effective choice and disadvantage, may have feelings antithetical to the principle such as, to perhaps overstate it, disappointment, incompetence, pointlessness, and self-disrespect.⁴² By reducing beforehand her disadvantage, she may avoid negative reactions. On a positive note, the self-implementation of precommitments involves the exercise of capacities more sophisticated than are typically used for a consumer purchase. Even with the constraint under consideration, plenty will remain in making consumer choices on which to exercise realized (and realizable) capacities. In fact, depending on the features of the precommitment, there may be more than before. For example, under the contemplated mandatory warranty offering, the additional information that springs from the offering will effectively enhance the consumer's choice.⁴³

Sixth, there may be other, interrelated standards for individual conduct, kindred to those above, that should not be compromised by precommitments. One, individuals "ought to prefer freedom."⁴⁴ Against this, I plead by way of confession and avoidance. By self-paternalising, one trades formal freedom for material freedom. The value of the trade should be obvious by now. Two and three, one should choose for oneself,⁴⁵ and act for oneself.⁴⁶ The modest

40. RAWLS, *supra* note 4, at 414. See Neil MacCormick, *Legal Right and Social Democracy*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY*, *supra* note 39, at 1, 11-12 (stating that capacity to make individual and joint life plans without arbitrary intervention from others is rewarding exercise of one's practical reasonableness).

41. See RAWLS, *supra* note 4, at 440-42.

42. See *supra* note 38 for a discussion of how continual battering of the consumer may lead to a reaction formation.

43. See *infra* section V.A.

44. FRANK H. KNIGHT, *The Sickness of Liberal Society*, in *FREEDOM AND REFORM* 370, 372 (1947). Notice the undercurrents of paradox and paternalism in this and the following ideas.

45. See Randy E. Barnett, *Contract Remedies and Inalienable Rights*, *SOC. PHIL. & POL'Y*, Autumn 1986, at 179, 191 ("[E]ven if one is doing 'all the right things,' one's life is truly impoverished if one is not freely choosing to do the right things.").

precommitments considered here, certainly insofar as they are self-chosen and self-achieved, do not run afoul of these principles. A required warranty offering, for example, does not seem to inhibit choice or action; arguably, as stated in the paragraph above, it does quite to the contrary through the concrete presentation of market information.

Seventh, “[s]pontaneity and immediacy are of value in themselves”⁴⁷ and should be preserved. Against the complaint that self-paternalism may reduce these qualities, I plead *nolo contendere*. A loss of spontaneity and immediacy (in being able to purchase goods under conditions of asymmetrical rationality) is a cost of self-paternalism.⁴⁸

Eighth, the recognition of self-paternalistic agreements may injure third parties, weaken the respect for human dignity, and “render the whole national character cold and hard.”⁴⁹ Once more, for the types of constraints on the table, falling far short of slavery contracts and the other extremes of primary concern to those who raise this objection, these risks are negligible. Instead, the public’s refusal to act on its awareness that consumers are systematically disadvantaged, even if the refusal stems from a noninterventionist principle rather than a lack of sympathy, may generate these nega-

46. See Regan, *supra* note 32, at 116 (“[W]e may not value equally Smith’s achieving her goals with paternalistic help and Smith’s achieving her goals on her own. In other words, we may think there is an important difference between Smith’s goals being achieved and Smith’s achieving them.”).

47. NAGEL, *supra* note 18, at 73 (“If spontaneity is a good, then one has reason to ensure that there will be spontaneity in one’s future, not only in the present.”).

48. Elster raised this objection by quoting Nagel’s words above. See ELSTER, ULYSSES, *supra* note 8, at 40-41 (“His [Nagel’s] argument is that too much spontaneity now may reduce the possibilities for spontaneous behaviour later on; my argument is rather that a strategy for reducing the undesirable consequences of spontaneity may also reduce the overall amount of spontaneity in my behavior.”). Spontaneity, however, must be properly anchored, since “the sheer desire for novelty . . . [or] to be different” are not good reasons for a preference change. *Id.* at 148. Furthermore, too much spontaneity is wantonness, since the very idea of deliberation, a key element of rational choice, “connotes an activity in which freedom is lost.” Harry Frankfurt, *Identification and Wholeheartedness*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 27, 43 (Ferdinand Schoeman ed., 1987) (footnote omitted).

49. Feinberg used these words in advancing this argument against the recognition of slavery contracts and reckless gambles. See FEINBERG, *supra* note 18, at 123-24; FEINBERG, HARM TO SELF, *supra* note 4, at 80-81. Calabresi submitted a similar moralism against the sale of bodily organs, and then pointed out: “Law, unlike economics, is not concerned only, or even primarily, with reduction of costs, ‘given tastes.’ It is fundamentally concerned with *shaping* tastes.” CALABRESI, *supra* note 5, at 81, 84 (footnote omitted). In the criminal context, Fletcher mentioned the similar downside of allowing persons to consent to injuries by others: “the social dangers of introducing others to forms of conduct that the law seeks categorically to discourage.” GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 771 (1978).

tive effects as well. The precommitments may actually decrease injuries to some third parties. For example, poor purchasing decisions presumably have negative spillovers on third parties who are dependent on the consumer. These spillovers are avoidable when the consumer is able to make better choices.⁵⁰

Ninth, precommitments may bottle-up motivations that reappear in other, destructive forms.⁵¹ To summarily dispose of this objection, when directed to plausible self-paternalism in the marketplace, one may ask, "What pertinent motivations, or what possible destructive manifestations?"

Tenth, self-paternalistic commitments are occasionally made from misinformation or overreaching.⁵² Disallowing the precommitments may be a means to prevent this indirectly when other methods are infeasible or inefficient.⁵³ In the marketplace, however, the other parties with an apparently aligned interest in the self-paternalism have no incentive to induce the consumer to make an unproductive precommitment. There is no conflict of interest because the consumer's dependents, if not general supporters, benefit from the precommitment along with the consumer.⁵⁴ The merchant, who

50. Third parties dependent on the merchant may well suffer harm when the merchant's advantage is reduced. These interests are discussed in the neutral dialogue below. See dialogue *infra* section V.B. (projecting viewpoints of self-paternalistic consumer, merchant, nonconsenting consumer, and society in general).

51. See Robert A. Burt, *Commentary on Schelling's "Enforcing Rules on Oneself"*, 1 J.L., ECON. & ORG. 381, 381-82 (1985) (presenting "symptom substitution").

52. A person consenting to an extreme self-paternalistic agreement, such as a slavery contract, is presumptively "incompetent, unfree, or misinformed." FEINBERG, *supra* note 18, at 122. This is a presumption only, for the slavery contract may be efficient. See Kronman, *supra* note 7, at 777 ("If Spartacus agrees to become the slave of Claudius in return for a guarantee of food, shelter, and education for his children, there is no a priori basis for thinking the exchange inefficient."). The consenter's "misinformation" may be about future contingencies, e.g., medical advances. See Buchanan, *supra* note 24, at 278-79 ("A second morally relevant difference is that the assumption that a competent person is the best judge of her own interests is weakened in the case of a choice about future contingencies under conditions in which those interests have changed in radical and unforeseen ways."); see also *supra* note 32 (discussing wrong commitments). The difficulty is in judging when a presumed irrational commitment is actually the case, particularly in charged settings. See FEINBERG, *supra* note 27, at 251.

53. See FEINBERG, *supra* note 27, at 251; JEFFRIE G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW* 230 (1984) (posing efficiency argument against self-paternalism through use of inalienability rules); FEINBERG, *supra* note 18, at 124-25; Kuffik, *supra* note 30, at 85-86. In other words, "the bar against self-enslavement can be viewed as a second-best device for preventing certain forms of deception and duress that cannot be attacked more directly." Kronman, *supra* note 7, at 777.

54. The problem instead may be underreaching by those protective of the decisionmaker, not overreaching by adversaries. See Buchanan, *supra* note 24, at 279:

For when the decision to forgo life-sustaining treatment is a remote and abstract possibility it is less likely to elicit the same protective responses that are provoked in family members and health care professionals when

prefers to discourage the constraint altogether, obviously does have an incentive to induce the consumer to enter into an irrational precommitment that enlarges the consumer's disadvantage. But the consumer is on guard against the merchant's machinations because such manipulations are among the very reasons for her adoption of the self-restraint. Furthermore, if government intervention is the method for implementing the precommitments, then hasty or ill-conceived moves, if not wholly precluded, are less likely.

By way of summary, the values supporting self-paternalism are weighty, especially in the context of the marketplace. Counterarguments remain, but they seem outweighed. To disallow the responsible actor from self-paternalizing is to paternalize her.⁵⁵

IV. SELF-PATERNALISM IN THE MARKETPLACE

Once the consumer contemplates redressing the differential rationality in the marketplace by self-paternalistic constraints, questions arise. Are suitable precommitments realistically achievable? If so, can they be made and implemented in an acceptable manner, taking into account justifiable complaints from interested and third parties? There are common protests against government intervention, but I first examine private remedial approaches in order to see if one can finesse the critique of intervention.

Before beginning this discussion, a major issue must be settled. What advantage may the self-paternalizing consumer realistically demand the merchant to relinquish? That the merchant stop imposing framing distortions by advertisements with famous or attractive spokespersons? That it fully disclose all relevant facts? That it refrain from using ambiguous and incomplete contract terms? Seemingly not, even if these promises could actually be satisfied. Such constraints would require extensive policing and a means of dispute resolution, as would comparable legislation.⁵⁶ For these types of

they are actually confronted with a human being who they believe can lead a meaningful life but who chooses to die.

55. See FEINBERG, *supra* note 18, at 128 ("In fact it would be paternalism to deny people the liberty of trading liberties for other benefits when they voluntarily choose to do so."). See also Allen Buchanan, *What's So Special About Rights?*, SOC. PHIL. & POL'Y, Autumn 1984, at 61, 80 ("Without the ability to waive, . . . a system of enforceable rights may itself be paternalistic."); but see Barnett, *supra* note 45, at 191-93 (defending inalienability on nonpaternalistic grounds). This leads, again, to an underlying paradox: "Plato pointed out that it is paradoxical to assert that men are free to act but not free to give up their freedom. The conflict here is between freedom of choice and freedom to change one's choices." SCOTT GORDON, WELFARE, JUSTICE, AND FREEDOM 132-33 (1980).

56. Private enforcement via mediation or arbitration keeps the agreement outside the public realm, assuming the enforcement mechanism itself doesn't break down from noncooperation. Or, even if the judiciary enforces the private legislation (i.e., contract),

promises, the administrative costs, to say nothing of uncertainty costs, appear prohibitive, that is, economically irrational for the private consumer.

One possible demand stands out as a way to reduce these complications. As anticipated by prior comments, the consumer may condition her willingness to deal on the offering by the merchant of a warranty. While the offering fails to counter some of the sources of irrationality (e.g., attractive spokespersons can still lead the consumer astray), as detailed below,⁵⁷ a warranty internalizes many of the true costs of the goods in the unequivocal form of a number on the bottom line (the price tag), thereby reducing the need to collect data and make calculations. The inherent imperfections of choice under risk and uncertainty, and the common techniques of merchants to exacerbate and impose these imperfections, are less consequential in the presence of this hard data.⁵⁸ Still, much of the consumer's original disadvantage remains because of the ability of the merchant to occasion distortions through such means as advertising.

A. *Nonbinding Self-Paternalism*

One step for the self-paternalizing consumer is to withdraw from the market and refuse to reenter until the merchant relinquishes some of its advantage by offering the warranty. The success of this

the state is invoked for a secondary purpose, not the primary one of creating the terms of the agreement itself. On the other hand, we may move in another direction and exclude all roles for the state if we take our cues from Nozick who instructs us on the virtues of private governments ("protective associations"). See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ch. 2 (1974) (discussing protective associations as groups of individuals who join in defending any member or aiding in enforcing her rights). They also, however, must be administered.

57. See *infra* section V.A.

58. If proffered warranties are this useful at offsetting differential rationality, it might be asked why more are appearing in the unregulated marketplace. My arguments imply that merchants would not wish to offer them for fear of losing their advantage. Let me speculate about this. Several things have increased consumer awareness of the value of warranties, thereby encouraging merchants to offer them. One, the courts and legislatures have been requiring certain warranties, which has increased consumer experience with them. Two, some warranties are offered by merchants who do not sell the goods themselves (e.g., from repair service providers and credit card companies), which gives these merchants an interest in emphasizing the long-term costs of defective goods. Three, for some time the Japanese and others have been clubbing certain American industries (e.g., those centered in Detroit) by espousing superior quality, which has forced the American industries to respond in kind by throwing down the gauntlet with expanded, publicized warranties. All this suggests that, greater product complexities aside, there is less differential rationality in the marketplace than there used to be. Yes, possibly, but much certainly remains, and it still is rational for the consumer to counter (fairly) however much there is.

approach turns on the profitability for the merchant of foregoing this advantage. The merchant who is responsive to the consumer's tactic will try to give up only as much of its edge as is necessary to entice the consumer back. Especially before the warranty offering is in place, it will be difficult for the consumer to estimate its value to her. The parties will engage in strategic behavior, but the merchant will be in a better position to maneuver because of the underlying differential rationality.

Beyond the valuation of the relinquished advantage, there are other strategic factors which govern the viability of the consumer's tactic. One factor is the success in conveying to the merchant the reasons for the individual boycott. Another factor is the success of demonstrating a strong self-commitment. Once these are accomplished the merchant will probably be unable to distinguish accurately a truly boycotting consumer from other consumers. If this is the case, the merchant may have to give up its advantage over all consumers in order to induce the boycotter to relent.⁵⁹ This lowers the profit margin per transaction, thereby diminishing the attractiveness of enticing the boycotter unless an increase in sales offsets the reduced margin. It appears that one or a few boycotting consumers are not enough to affect merchant behavior. As a result, the boycotter must convey the reasons for the boycott convincingly to other consumers as well as to the merchant, and other consumers must earnestly join it. Under this scenario, what starts off as an individual, nonbinding tactic rapidly turns into the need for concerted action under exacting circumstances. Otherwise, the noise from the one-woman band will be lost in the din of the marketplace.

In addition to the exacting circumstances for concerted action, there are other significant limitations to the consumer boycott. If the goods sought by the consumer are necessities instead of luxury goods, then the ability of the consumer to decline transactions is curtailed.⁶⁰ The demand for necessities requires another approach. One suggestion is that the consumer take it upon herself to develop

59. Cf. Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 638 (1979) (arguing that persons who search in market create "pecuniary externality" which protects nonsearchers from overreaching firms, "because in mass transactions it is usually too expensive for firms to distinguish among extensive, moderate, and nonsearchers.>"). Even if the merchant could distinguish among consumers, surrendering the advantage to the boycotters may necessarily surrender the advantage to all, for example, via information production or warranty offering.

60. Kennedy, hypothesizing various market structures, including competition, demand, and elasticity factors, disputed the distinction between necessities and luxuries. See Kennedy, *supra* note 4, at 618-19.

internal rules and strategies that produce patterns or habits in the marketplace to cope with the disadvantage.⁶¹ But upon recollection of the nature of the asymmetry, one cannot be sanguine about this technique. For example, even when the needed data is available somewhere, surmounting the information shortfalls by oneself is itself typically irrational (i.e., inefficient) because, for all but relatively expensive goods, the cost of doing this is greater than the payoff.⁶² Furthermore, it is difficult for the consumer to generate sufficient willpower. Maintaining a diet is an example of the challenge to one's willpower despite the fact that information about the costs and benefits of dieting is readily available and ubiquitous (in the mirror, for example). In contrast, the evaluation of market goods involves vague probabilistic eventualities and intangible qualities.⁶³ Generating the will to act or refrain is difficult enough when hard data is readily available. Rationalization is too easy when the information is soft. To summarize without delving further into the problems of singlehandedly overcoming other asymmetries, discretionary individual strategies seem patently unlikely to be effective.⁶⁴

Even with the pledged cooperation of other consumers, optional, unenforceable efforts seem similarly futile. The experience of the labor movement suggests that voluntary boycotts, picketing, and other concerted actions are usually not alone enough to force the antagonist to negotiate. Organized labor learned that to act as a united front, even with an amount of solidarity not apparent among

61. See *supra* note 8. Scott, worried about the unintended secondary effects of regulation, wrote that self-control may be enough: "The risk of systematic manipulation by simple framing illusions seems less acute if consumers can routinely develop behavioral rules to facilitate their decisionmaking." Scott, *supra* note 8, at 348.

62. See Kuklin, *supra* note 2, at 952-53. Furthermore, not only is much of the readily available information exclusively in the possession of the merchant who has an interest in suppressing some of it (i.e., the bad news), but also information will be under-produced in any event because, being a public good (i.e., not consumed by use as is, say, bubble gum), an efficient private market in it will not develop owing to freeriders. Cf. *infra* note 69 (explaining freeriders).

63. While the Sirens of the marketplace are the weak sisters of the Sirens of the refrigerator, Scott, after suggesting that self-control may overcome simple framing illusions, see Scott, *supra* note 61, conceded: "It may be, of course, that the internal rules and strategies people use to facilitate their decisionmaking do not have a dominating effect." Scott, *supra* note 8, at 347. This is especially likely when one adds the many other sources of irrationalities. Should one resort to drugs, hypnotism and support groups, as do dieters?

64. Kennedy stated that, through the profit motive, the invisible hand will work regarding contract terms even when consumers lack bargaining power, "if both sides have good information." See Kennedy, *supra* note 4, at 607-08. My response should be clear by now. Both sides don't have good information. Even if they did, both sides are subject to other decisionmaking handicaps, the consumer more than the merchant, that also hinder the efficient operation of the invisible hand.

consumers, it must be able to prevent members from dividing off. In creating this solidarity, the labor movement used the exclusive bargaining agreement.⁶⁵ The rational consumer would consider a comparable approach.

B. Contractual Self-Paternalism

For consumers to maintain a united front, a private contract may overcome the defection tendencies intrinsic to nonbinding concerted action. I refer not to a contract between the consumer and the merchant, as would be analogous to the labor movement, for the disadvantage of the consumer in entering into a contract with the merchant is the very reason for considering self-paternalistic strategies, but instead to a contract among consumers. Specifically, consumers may agree to a type of no-buy pledge like the ones used by tenants of apartment buildings being converted into cooperatives or condominiums.⁶⁶ The contracting consumers agree not to do business with merchants who refuse to surrender their advantage. When enough consumers bind themselves, a market demand presumably will induce some merchants to meet the required terms.

Unfortunately, the tactic of privately adopting joint, binding, self-paternalistic restrictions is very unlikely to work. As with nonbinding precommitments, the logic of collective action opposes such a

65. See generally ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* ch. XIX (1976) (discussing principle of exclusive representation and its relationship to duty to bargain in good faith with majority representative).

66. "The no-buy pledge consists of an agreement among the tenants not to purchase an apartment in the building [being converted into a condominium or cooperative] until the tenants' executive committee, acting on the advice of counsel, votes to accept the offering and release the tenants from the pledge, or until certain conditions are met.

Patrick A. Rohan & Daniel J. Furlong, *The No-Buy Pledge: A Potential Tool for Tenants in a Condominium Conversion*, 10 WM. MITCHELL L. REV. 49, 52 (1984). Along with issues of contractual consideration and mutuality of obligation, a problem with no-buy pledges is that they smack of restraints of trade. See *id.* at 55-62. While courts have enforced the pledges, the law on the issue has not yet matured. Rohan and Furlong predicted that "Some states may find such pledges to be violative of their common law or statutes, while other jurisdictions may sustain them, at least where the pledges have not been tainted by other facts or circumstances." *Id.* at 66. With respect to the restraint of trade problem, when the market is not free, when there are disparities in the bargaining powers of the parties, the legislatures have been willing to intervene. An example of this is the legislation facilitating the labor movement. This effectively allowed employees to constrain one another from contracting with the employer, unless the workers' representative agrees, thereby creating bargaining leverage to get the employer to accede to certain demands. See, e.g., National Labor Relations Act § 9(a), 29 U.S.C.A. § 159(a) (West 1978).

tactic.⁶⁷ First, the transaction costs are prohibitive.⁶⁸ To inform and convince a sufficiently large number of consumers of the value of the no-buy agreement is difficult enough without budget constraints. In the circumstances under consideration, the budget is limited in theory by the savings to be garnered from forcing the merchants to surrender their advantage, and limited in practice by the amount that can be raised from subscribing consumers, keeping in mind that the typical consumer misperceives the value of the warranty. Second, there is a substantial freerider problem.⁶⁹ Whether or not a consumer agrees to the no-buy pledge, she acquires the benefits of the merchant's concession.⁷⁰ If the agreement is not mandatory, why bother to subscribe? In a nutshell, purely private strategies are not the solution.⁷¹

67. The seminal work in this growing discipline is MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1971).

68. This is one of the "three separate but cumulative factors that keep larger groups from furthering their own interests." *Id.* at 48. Specifically, "the larger the number of members in the group the greater the organization costs, and thus the higher the hurdle that must be jumped before any of the collective good at all can be obtained." *Id.* For the problem in the marketplace, not all the consumers need to be organized to induce merchants to respond.

69. The freerider problem is: "A barrier to successful collective action or to the production of a public good that arises because all or some individuals attempt to take a free ride on the contribution of others." BUCHANAN, *supra* note 1, at 124.

70. For example, even without purchasing the warranty, the consumer obtains the information it reveals and the value of the increased quality of the goods it precipitates. *See infra* section V.A.

Recently a theory has been forwarded to indicate why freeriding is not as ubiquitous as the standard theory of collective action predicts. The individual has a sense of satisfaction from doing her fair share, and thus is willing to pitch in when others might otherwise cover for her. *See* HOWARD MARGOLIS, *SELFISHNESS, ALTRUISM, AND RATIONALITY* (1982). Whether this mentality is sufficient to overcome the problems of collective action in the marketplace is an empirical question. I am skeptical.

71. In sum, "unless the number of individuals in a group is quite small, or unless there is coercion or some other special device to make individuals act in their common interest, rational, self-interested individuals will not act to achieve their common or group interests." OLSON, *supra* note 67, at 2 (emphasis omitted); *see* MARGOLIS, *supra* note 70, at 99 ("Hence, the main result of the theory: concentrated economic interests (typically, producers) will have a political advantage over diffused interests (typically, consumers)."). The solution has overtones of self-paternalism:

In such cases [of freerider problems], the individuals involved may need the use of compulsion to give effect to their collective judgment of their own interest by guaranteeing each individual compliance by the others. In these cases, compulsion is not used to achieve some benefit that is not recognized to be a benefit by those concerned, but rather because it is the only feasible means of achieving some benefit which is recognized as such by all concerned.

Dworkin, *supra* note 7, at 23. *See* Hardin, *supra* note 30, at 58-59.

C. *Self-Paternalistic Public Intervention*

The difficulties of private concerted action force the rational consumer to consider approaching the courts and legislatures for direct intervention in the name of self-paternalism.⁷² This type of government support will be more effective than the simple enforcement of private action via contract.⁷³ While this move may be second-best,⁷⁴ it is better than the status quo.⁷⁵ The government is open to the notion of self-paternalism,⁷⁶ because the structure of the liberal

72. For the consumer aiming to protect herself, "The natural step is to look to government intervention; *i.e.*, to invoke the political 'market' instead of the economic one to correct the latter's alleged imperfections." Arthur A. Leff, *Unconscionability and the Crowd — Consumers and the Common Law Tradition*, 31 U. PITT. L. REV. 349, 351 (1970) (footnote omitted). Because of the logic of collective action, "if the rights of collectives are to be secured, they will commonly have to be secured by state action on behalf of the affected classes without the kind of general, in-principle agreement that we might expect to support the simpler dyadic rights of freedom of contract." Hardin, *supra* note 30, at 69. Once again, this is not (necessarily) paternalism. See ELSTER, ULYSSES, *supra* note 8, at 84 ("[I]ndividuals are free to bind themselves (through laws) to bind themselves (with safety belts), or to protect their 'deeper' values against their more impulsive ones. The hard problems arise when these restrictions are imposed on the individuals, against their *ex ante facto* (and perhaps their *ex post facto*) preferences.").

73. As in dealing privately with the disadvantage in the marketplace, the logic of collective action raises formidable obstacles for consumers in gaining adequate legislative support. Olson stated that:

The only organizations that have the 'selective incentives' available [to mobilize a latent group, e.g., consumers] are those that (1) have the authority and capacity to be coercive [e.g., labor unions], or (2) have a source of positive inducements that they can offer the individuals in a latent group [e.g., the provision of social or recreational benefits].

OLSON, *supra* note 67, at 133.

74. "Even when not rational, man knows that he is irrational and can bind himself to protect himself against the irrationality. This second-best or imperfect rationality takes care both of reason and of passion." ELSTER, ULYSSES, *supra* note 8, at 111 (emphasis omitted). For the neutral dialogue behind the theory of second best, see ACKERMAN, *supra* note 35, at 233-34. Perhaps the move is third-best: "Morality is a potential solution to the problem of market failure." Jody S. Kraus & Jules L. Coleman, *Morality and the Theory of Rational Choice*, 97 ETHICS 715, 717 (1987); see also Jules L. Coleman, *Competition and Cooperation*, 98 ETHICS 76, 80-81 (1987) (discussing law, politics and morality as possible solutions to market failure). Undue efforts at seeking the second-best may lead to the third-best: "[T]o avoid the mistake under second-best conditions, the statesman must recognize that the quest for the best feasible structure, regardless of cost, is self-defeating in terms of the liberal ideal itself." ACKERMAN, *supra*, at 254.

75. It is better, as argued in the next section, owing to efficiency and fairness. In light of the asymmetry being addressed, perhaps I need not be apologetic about intervention. One libertarian may be cited in support: "Even the most essential prerequisite of [an effective competitive system's] proper functioning, the prevention of fraud and deception (including exploitation of ignorance), provides a great and by no means yet fully accomplished object of legislative activity." FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 39 (1944).

76. In 1929, Pollock justified the legal practice in which a person: initiate[s] compulsory proceedings against himself: as when, as the law of some countries now allows, a drunkard enters of his free will a licensed

state relies upon collective precommitments (e.g., periodic elections).⁷⁷ Once the consumer contemplates the step of seeking intervention, she must confront a host of reverberations beyond those relevant to purely private action. Even though it is obviously rational for a person to obtain net benefits from the government, the essential question is whether the government should accede.⁷⁸

V. THE TRADEOFFS OF SELF-PATERNALISTIC INTERVENTION

As a focus for the inquiry of whether the government should adopt self-paternalistic restraints in the marketplace, I discuss the pros and cons of the requirement that the merchant offer a warranty to the consumer. While I have referred to such a rule above, here the particulars of a warranty requirement are more central to the discussion. Despite the fact that the rule is on the weak side of possible regulations, it suffices to show the types of tradeoffs involved. I have divided considerations of the warranty rule into two categories, economic and moral, with the latter topic extending into political theory.

institution for the treatment of dipsomania, and, having so entered it, may lawfully be detained for a certain time notwithstanding any attempted revocation of his consent. . . . From a moral point of view we should say that a man in this condition is really divided against himself, and that the law, taking notice of this abnormal fact, enables him to strengthen his better against his worser self.

SIR FREDRICK POLLOCK, *A First Book of Jurisprudence: Some General Legal Notions*, in JURISPRUDENCE AND LEGAL ESSAYS 1, 36-37 (1961).

77. Elster referred to governmental institutions that can be seen as precommitment devices. See ELSTER, ULYSSES, *supra* note 8, at 89-90. He included, depending on the state, the central bank, foreign ministries, the BBC model of broadcasting, and periodic elections. Schelling advanced the secret ballot as another example. See SCHELLING, CONFLICT, *supra* note 6, at 19 ("[T]he mandatory secret ballot is a scheme to deny the voter any means of proving which way he voted. Being stripped of his power to prove how he voted, he is stripped of his power to be intimidated."). For more along these lines, see *infra* note 193 and accompanying text.

78. The answer to the question may be foreshadowed by a rule of thumb: "[T]he less equal are the parties to an agreement likely to be the more will the law tend to restrict their freedom." Joseph Raz, *On the Functions of Law*, in OXFORD ESSAYS IN JURISPRUDENCE 278, 293 (A.W.B. Simpson ed., 2d series 1973). If the intervention is deemed paternalistic, Shapiro argued that it should be up to the legislature, not the courts, because of greater institutional competence and paternalism's problematic acceptability. See Shapiro, *supra* note 7. That it is the legislature that intervenes makes it possible to view some restrictions as self-paternalistic which would appear paternalistic by a court. See *id.* at 564.

A. The Economics of Intervention

The contemplated government intervention creates allocative and distributive consequences.⁷⁹ I first examine allocative effects.

The mandatory warranty offering may lead to greater efficiency.⁸⁰ The clearest source of asymmetrical rationality is transaction costs, primarily of obtaining and processing information. The warranty, insofar as it is a product of competitive pricing, reflects in manageable form the discounted costs of an important range of attributes otherwise obtainable by the consumer only through experience or research and reckoning (e.g., durability),⁸¹ which is difficult to esti-

79. Assumed costless market and nonmarket approaches are, in theory, equally good ways of solving market problems. See GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* 213 n.4 (1978). "In practice, then, the engaging question must be which in fact costs more to establish in a particular situation and who bears the cost under each of the two approaches." *Id.* See also Lewis A. Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591, 607-08 (1980) (recognizing that, though induced level of care is same, there is distributive difference between strict products liability system and system with negligence and contributory negligence). But Posner insisted, for Coasean reasons, that "the choice among common law rules usually does not have systematic distributive consequences." RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 102 (1981).

80. Intervention required because of market failure should mimic, according to Posnerians, the result of an ideal market. See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 542 (1980) ("They opt, in other words, for the efficient outcome aspect of markets rather than their autonomous exchange component."). My outlook, weighted towards the idea that legal and moral responsibility follows from rationally chosen acts, emphasizes the autonomous exchange component, not efficiency, although I believe that efficiency gains may occur as well. In one of his articles, Schwartz doubted the efficiency of mandatory warranties, see Alan Schwartz, *A Reexamination of Nonsubstantive Unconscionability*, 63 VA. L. REV. 1053, 1057-63 (1977), but this article excluded consideration of information failures, see *id.* at 1055, which he recognized to be an important factor, see *id.* at 1083. In a later article, he and Wilde took up the topic of information failures. See Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1461-62 (1983). They concluded that "if consumers actually care about important contract terms, legislatures should facilitate comparison shopping for them and courts should ban only those trivial terms that seem unfair." *Id.* at 1462. Rizzo took a broader view and cautioned that efficiency arguments involve extremely high information requirements going beyond the transacting parties (spillover effects), and, being "well beyond the capacity of the courts or anyone else," raise the problem of second best. Mario J. Rizzo, *The Mirage of Efficiency*, 8 HOFSTRA L. REV. 641, 642 (1980) (footnote omitted). For the theory of second best, see *infra* note 103. Shavell compared under differing circumstances the efficiency of regimes of negligence versus strict liability (e.g., warranty), and concluded, depending on whether the accident is between strangers, sellers and strangers, or sellers and customers, that strict liability is sometimes more efficient, the problems being the customers' misperceived risks and, especially, the parties' moral hazards. See Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

81. For the repeat player, say, the institutional buyer or the buyer of regularly replaced goods, some of the information costs are amortized over many goods. Experience and credence qualities will also be relatively cheaper to discern over the long

mate at the time of purchase. Because of the warranty, the consumer need not face being inundated by a flood of raw data, or being left dry with minimal information.⁸² The merchant's predigestion of much input by the refined calculations needed to set a price for the warranty helps narrow the gap towards Pareto Optimality.⁸³

Under the laws of supply and demand, the reduction of these consumer transaction costs points towards increased volume for the merchant. On the other hand, *ex hypothesi*, the consumer had misperceived some of the underlying costs. If, once they are more readily apparent, the costs are higher than expected by the con-

run. See Kuklin, *supra* note 2, at 938 n.155. (Goods have three types of qualities: search, which are evident upon inspection before purchase, e.g., visual aesthetics; experience, which require use after purchase, e.g., the taste of food; and credence, which need special expertise even after purchase, e.g., whether the replaced auto part was actually defective. *Id.*) The research effort may even be a positive, psychic benefit to the consumer who, say, is a "techie" obtaining pleasure from poring over esoteric journals. This last point adumbrates the way in which the concepts of an opportunity cost and psychic benefit can be summoned as wild cards to ascribe rationality to a choice that otherwise seems inefficient, or to write off these costs and benefits as unknowable, thereby averting the demand to face up to the economic and moral consequences of asymmetrical rationality. See generally Bailey Kuklin, *The Gaps Between the Fingers of the Invisible Hand* (unpublished manuscript, on file with author, Brooklyn Law School).

82. From the strict liability under warranties, "because firms are liable for the actual losses, consumers will be forced to take the actual risks into account through the prices charged by firms." A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 100 (2d ed. 1989). The efficiency of strict liability is, consequently, independent of consumer information. See *id.* Regarding the compulsory disclosure aspects of a mandatory warranty offering, even when enforcement costs are included, "Not only may the benefits of compulsory disclosure exceed those of voluntary disclosure, but it is at least possible for the costs of compulsory disclosure to be less than the costs of voluntary disclosure." William C. Whitford, *The Functions of Disclosure Regulation in Consumer Transactions*, 1973 *Wis. L. Rev.* 400, 432.

83. Meaning, it will lead to better resource allocation. See Kornhauser, *supra* note 79, at 608. While "both parties to the contract benefit from the reduced transaction costs," *id.*, for the consumer, the "improved choices [from more efficient purchasing decisions] can lead to a large gain," H. Beales et al., *The Efficient Regulation of Consumer Information*, 24 *J.L. & ECON.* 491, 502 (1981); but cf. Bailey Kuklin, *On the Knowing Inclusion of Unenforceable Contract and Lease Terms*, 56 *U. CIN. L. REV.* 845, 862-63 (1988) (arguing that uninformed purchases may be fortuitously efficient).

In analyzing why some contractual and tort duties are strict, Bishop, after noting the information function of a price system and the seller's advantage in knowledge, urged this as the predominant answer: the seller's "strict promise or unconditional warranty of quality enables the buyer to use the seller's information even though the buyer does not possess it himself. Contract duties are strict in order to transmit information or to make information credible so that it may be used by others." William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 *J. LEGAL STUD.* 241, 245 (1983). That merchants are not ignorant of this, see, for example, the Renault advertisement of its "protection plan" in *Scientific American*. *SCI. AM.*, May 1985, at 78-79 ("We wouldn't offer the industry's best small car protection unless we were sure our cars would live up to it.").

sumer, the sales will decrease in favor of relatively cheaper substitute goods. Whether these two offsetting factors will lead to higher or lower volume is an empirical matter.⁸⁴

With a warranty offering, the goods and services probably improve. The merchant (producer) will improve them to the point where its cost for additional quality gains surpasses its benefit from reduced warranty claims, and the rational consumer will willingly pay for this.⁸⁵ The merchant may have economies of scale, as, for example, in making repairs under the warranty,⁸⁶ or in spreading losses by obtaining insurance against mishaps.⁸⁷ All else being equal, the net result is a gain in social welfare because consumers as a class will get more for their money.⁸⁸

The offering of a warranty will alter the effects of moral hazard.⁸⁹ The merchant and the consumer who select the warranty impose

84. Many of my points require empirical work. "The one thing one can say with great assurance is the following: no flat, a priori judgments about the price and quantity effects of compulsory terms are possible — it all depends on the shapes of the [supply and demand] curves and the structure of the market." Kennedy, *supra* note 4, at 607.

85. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §§ 6.5-6, 6.10-11 (2d ed. 1977). The value of the increased safety may be greater than the cost of the improvements. See *id.* at 126. Because not all consumers will opt for the warranty, the quality improvements will be less than for a mandatory warranty. See discussion of distributive consequences *infra* note 106.

86. Because warranty work is labor intensive, Schwartz doubted there are significant economies of scale. See Schwartz, *supra* note 80, at 1060. But in making his case, he failed to note that the transaction costs of the consumer, primarily search (information) costs in finding a suitable repairer, and the risks from the service credence qualities (e.g., repairer's honesty) may be circumvented by the warranty. Schwartz made a second point: "[E]ven if important economies of scale do exist, sellers are likely to have tapped these opportunities without state intervention." *Id.* at 1061. This reliance upon the invisible hand assumes the absence of information shortcomings and consumer irrationalities, which I dispute, these factors being beyond the scope of his article. See *id.* at 1055.

87. See POSNER, *supra* note 85, at 137, 141.

88. The information implicit in a warranty creates a positive effect another way: "If buyers are unaware of product defects, then high quality sellers cannot command higher prices than low quality sellers, and there may be a general deterioration in quality." Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 939 (1985) (discussing "information asymmetry"). See also Schwartz, *supra* note 21, at 9 (arguing that uninformed buyers will purchase too many high-risk goods). On the other hand, disclosure requirements for certain product attributes may only shift demand to those competitive producers of similar goods with a comparative advantage with respect to the attributes. "[I]f consumers desire the attribute, then they benefit from the disclosure as well. If there is a wealth transfer in this context, it is an intra-industry transfer from one set of firms to another." Roberta Romano, *A Comment on Information Overload, Cognitive Illusions, and Their Implications for Public Policy*, 59 S. CAL. L. REV. 313, 321 (1986).

89. Moral hazard is the undesirable side effect whereby "the provision of insurance [or other loss protection, e.g., a strict or nonliability rule] may increase the probability of a loss or the size of the loss because the insured person has less of an incentive to take

obvious moral hazards upon one another. Either party may take advantage, properly or improperly, of the risks contractually assumed by the other. To clarify this, assume the merchant (producer) of a television set warrants only the picture tube. As a result, the consumer will then have less incentive to be careful with the tube (say, the brightness control is turned up and the set kept on when no one is viewing). Also, when nonwarranted defects occur the consumer may be tempted to damage the picture tube in order to hide the uncovered flaw, or the consumer might claim that the faulty picture tube caused the other defect.⁹⁰ The merchant, on the other hand, has comparable opportunistic gambits. When servicing or making the set, it has less reason to be diligent about the nonwarranted parts. Tube flaws may be attributed, falsely or questionably, to other parts of the set or to abuse by the consumer. These moral hazards undermine the goal of risk avoidance because the consumer who can pass along accident or defect costs has less reason to take precautions even though such precautions may be cheaper than the merchant's,⁹¹ and vice versa. Furthermore, unless they are liable, neither party has an incentive to be careful about injuries to third parties.⁹²

The moral hazards may be diminished by some techniques. For example, the clear elucidation of rights shrinks the fuzzy margin around legitimate claims, making it more difficult to manufacture questionable ones.⁹³ Additionally, sharing risks, as by splitting the costs of warranty service, creates an incentive for both parties to be careful.⁹⁴ But absolute rules do not solve the problem. While strict *caveat emptor* at one pole, or an unlimited warranty at the other, make

precautions." POLINSKY, *supra* note 82, at 56. I use the term expansively to include the opportunistic behavior that increases the losses from wrongful or problematic claims.

90. Because consumers vary in their carelessness or downright dishonesty, there will be distributive consequences. The consumer who rarely makes claims effectively subsidizes the common claimant by paying an "insurance premium" based upon the average claim record. The subsidy may be reduced if the merchant can differentiate among high and low risk consumer-claimants, which seems difficult.

91. See POSNER, *supra* note 85, § 6.11.

92. See *id.* at 125-26.

93. See also discussion of uncertainty costs *infra* note 98 and accompanying text.

94. For this to be effective, more information is required than is probably utilized. In particular, since the consumer is likely to underestimate expected losses, see Kuklin, *supra* note 2, at 972-79, 993, she will not take the proper precautions. See POLINSKY, *supra* note 82, at 104-05 ("Thus, when consumers can affect expected accident losses by taking care, but underestimate these losses, neither strict liability with a defense of contributory negligence nor negligence may be ideal with respect to the care exercised by the parties or with respect to the allocation of risk.").

it hard to assert or resist claims,⁹⁵ the rules maximize reciprocal hazards. In other words, strict *caveat emptor* minimizes the merchant's incentive for care, while an unlimited warranty minimizes the consumer's incentive for care. The merchant is concerned about goodwill losses despite a rule of *caveat emptor*, but these may be slight, especially for rarely purchased consumer goods.⁹⁶

In addition to rule oriented moral hazards, there are other sources of inefficiency. Some inefficiencies are transitional. For example, the distillation of a warranty law through the dispute resolution processes creates administrative costs.⁹⁷ Insofar as the law is indefinite, from static vagueness or during dynamic reformulation, uncertainty costs follow from the reluctance of parties to take risks.⁹⁸ Even when the law is fixed, administrative costs remain,⁹⁹ although law reform is relatively inexpensive when implemented not by a regulatory apparatus, but by a change in legal rules only.¹⁰⁰ By mandating the warranty offering despite ostensible contract terms to the contrary, the government desanctifies contracts, thereby cre-

95. Hard, but not impossible. A reciprocal moral hazard does not result from divided risks only. For example, even under strict *caveat emptor*, the concern for goodwill and the transaction costs of dealing with an aggressive, persistent consumer may result in a type of moral hazard for the merchant. From the other side, even if the merchant assumes all risks, this type of moral hazard remains for the consumer, as when the merchant denies liability, saying "so sue me" in the belief that the consumer's dispute costs will put an end to the matter. At this juncture, the usual countervailing factors in dispute resolution come into play. For example, regarding opportunity costs, if the consumer values her time more than does the merchant, the consumer may quickly capitulate. Once the dispute advances beyond face-to-face complaint, the merchant may have the economies of scale in resolving it, as by having a legal department.

96. Along with this last point, Kleinig posits that, despite the poor quality of goods, the merchant's goodwill may be maintained by advertising, publicity strategies, remoteness of harmful effects, and co-optation of media relying upon advertising revenues. See KLEINIG, *supra* note 7, at 190. " 'Brand name' buying is some help, but even that may be no safeguard against exploitation." *Id.*

97. Entirely private dispute resolution internalizes all the costs. Public resolution, as through the courts, internalizes some of the costs, e.g., lawyer's fees.

98. See, e.g., POSNER, *supra* note 85, at 424-25; Kuklin, *supra* note 83, at 884-85.

99. Polinsky and Posner examined the relative administrative costs under regimes of negligence and strict liability, concluding that the cheaper system cannot be clearly predicted. See POLINSKY, *supra* note 82, at 50-51; POSNER, *supra* note 85, § 21.5.

100. This law reform is cheap because "[n]o administrative apparatus is necessary to police the new regime; the parties themselves will adjust to the absence of [the old rule], as today they adjust to its presence." Alan Schwartz, *Optimality and the Cutoff of Defenses Against Financers of Consumer Sales*, 15 INDUS. & COM. L. REV. 499, 504 n.7 (1974). Even if not cheap, "[t]o the extent the benchmark for the measurement of costs is a perfectly functioning market, observing high costs of regulation does not imply that regulation is not wealth maximizing." Kornhauser, *supra* note 79, at 623 n.70. Or not justice maximizing: "if an increase in litigation is the price we must pay for securing justice, we might say (within limits) — so be it." Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303, 321-22 (1988).

ating a demoralization loss for those who lend importance to sanctified contracts.¹⁰¹ On the other hand, there will be a psychic gain for those who lend importance to desanctifying contracts deemed to be unfair or inefficient.¹⁰²

Beyond the efficiency questions, there are distributive effects to intervention.¹⁰³ Once the warranty offering reveals costs that were previously misperceived by the consumer, market changes occur which impact on the merchant, consumer, and third parties. The merchant loses the profit which had been made from inefficient purchases.¹⁰⁴ The mandatory warranty offering shifts wealth from

101. Michelman coined "demoralization costs" while writing about compensable takings:

'Demoralization costs' are defined as the total of (1) the dollar value necessary to offset disutilities which accrue to losers and their sympathizers specifically from the realization that no compensation is offered, and (2) the present capitalized dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralization of uncompensated losers, their sympathizers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion.

Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (footnote omitted).

102. My approach to the problem of asymmetrical rationality may be expressed cynically this way:

As far as I can tell, any law may be justified as a rational response to a market failure. If a constituency exists for a law, many people support it. The rest is easy. An economist needs only to identify a 'moral' externality, talk about 'free rider' problems, and then say that the benefits of the legislation exceed the costs.

Mark Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1405 n.54 (1981). One hopes that Sagoff misspoke when he said "any law" can be so defended. Be that as it may, as he recognized, this only shows that the human condition involves difficult questions that cannot be solved by strict adherence to simplistic dogma, such as blind faith in government intervention, or blind faith in the invisible hand.

103. The discussion of distributive effects encounters this cautionary observation:

[T]he general theory of second best applies as much to . . . distributional issues as it does to the allocative-efficiency questions with which it has traditionally been associated. . . . According to the general theory of the second best, given any set of conditions whose fulfillment guarantees the achievement of an optimum, if one or more of these conditions cannot be fulfilled, there is no general reason to assume that a situation in which more of the remaining conditions are fulfilled will be superior to one in which fewer of the remaining conditions are fulfilled.

Richard S. Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency*, 8 HOFSTRA L. REV. 811, 884 & n.29 (1980).

104. The preferences of the parties and structure of the market may lead to redistribution from the merchant to the consumer by other pathways as well. See Kennedy, *supra* note 4, at 610-12, app. B(1). One would normally expect wealth to be shifted from the merchant to the consumer, presumably then, from the richer to the poorer. See *id.* On the other hand, the market may be such that wealth is shifted from the consumer to the merchant, or both may be made worse off. See *id.* at 612.

the merchant of goods with previously greater hidden costs to the competitor with lesser ones. The merchant whose profitability depended on the lost advantage is driven out of business.¹⁰⁵

Turning to the distributive effects on the consumer, as much as her costs are lowered, her wealth increases.¹⁰⁶ The warranty offering shifts wealth from the consumer who had been less disadvantaged by the differential rationality (such as one from the more sophisticated socioeconomic classes), or who does not prefer the self-paternalistic warranty offering, to the consumer who had been more disadvantaged, or who does prefer the new warranty term.¹⁰⁷ Turning finally to effects on third parties, those subject to negative externalities from the purchased goods may also become better off, as from safety measures.¹⁰⁸ The effects, both positive and negative,

105. *See id.* at 598. Furthermore, as noted for required disclosure, "Imposing the costs of disclosure initially on the seller can also increase the cost of entry into that market. Consequently, seller disclosure regulation can have some anticompetitive effects which may offset the procompetitive effects resulting from an increase in comparison shopping." Whitford, *supra* note 82, at 460 n.187.

106. Overall wealth may increase because, owing to liability savings, the producer may improve safety at a zero, long-term cost. *See supra* note 85; *see also* Kennedy, *supra* note 4, at 610 ("[S]ellers [may] pass along no price increase at all because they are able to modify their own or their employees' behavior, in response to the term, in a way that has no impact on their costs."). Consumers may capture the producer's monopoly profits. *See* CHARLES FRIED, *CONTRACT AS PROMISE* 7 (1981) ("By refusing to enforce the no-warranty clause, we force automobile manufacturers to give up their monopoly profits to consumers, and the result will be greater economic efficiency — manufacturers will be moved to manufacture more or safer cars at the lower price.").

107. *See* Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211, 231-39 (1976) (discussing cross-subsidization tendency of price regulation). Kennedy noticed that "to the extent that the term is unwanted, its cost will be distributed between the parties, impoverishing sellers and buyers differentially according to the elasticities of supply and demand curves and according to the competitive structure of the market." Kennedy, *supra* note 4, at 609. For more complicated permutations, *see id.* at 611 n.19. Conceivably, wealth may be shifted from the poorer consumers to the wealthier. *See id.* at 612-13. Schwartz made this point on the grounds that the poor are more risk averse and have less to lose upon default than the rich, and thus the mandatory term "will bear more harshly upon the poor than upon the affluent." *See* Schwartz, *supra* note 80, at 1058-59. On the economic effects of risk attitudes, *see generally* Kuklin, *supra* note 2, at 974. Regarding disclosure regulation, Whitford noted that, insofar as sophistication in using information coincides with wealth, the benefits may favor the wealthier, and if consumers bear the costs of disclosure, this constitutes "a form of regressive taxation." Whitford, *supra* note 82, at 460 (footnote omitted). When one throws in transaction costs related to the loss, including perhaps the higher opportunity costs of the wealthier, the bottom line is beyond calculation. *See infra* note 110. Finally, there is another factor when the merchant offers various options, particularly warranty coverage. If the consumer has and accurately processes information about her own costs that is unknown to the merchant, the strategic behavior of the consumer and the merchant will lead to inefficiencies possibly having distributive consequences. *See* Schwartz, *supra* note 21, at 26-28.

108. *See* KLEINIG, *supra* note 7, at 188-89 (discussing "argument from externalities" that supports minimum quality and safety standards); Kennedy, *supra* note 4, at 609

of the mandatory warranty ripple out to dependents (e.g., spouses and children) and supporters (e.g., parents and friends), to workers in directly impacted industries (and their dependents and supporters), to those involved with markets that feel the result of reallocating resources, and lastly to those who contribute to social insurance funds (e.g., taxpayers).¹⁰⁹ However, even if these allocative and distributive effects can be calculated, which may be doubted,¹¹⁰ moral and political questions cannot be answered by a cost-benefit analysis alone.¹¹¹

B. *The Morality of Self-Paternalistic Intervention*

Several viewpoints should be given voice in the debate over the normative appropriateness of intervention, in this instance, the mandatory warranty offering.¹¹² The self-paternalistic consumer

(arguing that mandatory safety measures "reduce the risk of injury to bystanders as well as to buyers"). Schwartz considered other third-party effects by assuming "that X, a wealthy individual, derives satisfaction (or, as economists say, 'utility') from the knowledge that poor people make 'wise' purchases." Schwartz, *supra* note 80, at 1061. He discounted this effect because of the indefiniteness of the required calculations that must include "the effect on the utilities of those Y's (negative) who derive satisfaction from knowing that the poor are free to contract." *Id.* at 1062. I would ignore both effects because they derive from the pleasures of paternalists, both X and Y, this element properly being irrelevant. These "other-regarding" repercussions are socially noncognizable under Mill's "harm principle". See Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1, 35-38 (1989).

109. See Kennedy, *supra* note 4, at 609.

110. Especially in light of the additional complications mentioned in the footnotes above, once again, the net effect, as Kennedy put it, is indeterminate. See *id.* at 609-14. Apparently to deprecate the motives of the liberal, Kennedy opined "that it will often make sense for a decision maker to make rough intuitive assessments of all these factors and then go ahead and act on distributive grounds," on efficiency grounds, and "on the ground that the only people he is likely to hurt are sellers." *Id.* at 614. Finally, to throw salt at the wounds of the bleeding-heart liberal, "When we add the factor of paternalism, . . . there may be a strong case for intervention even with sketchy information and a lot of uncertainty about just how the effects will play themselves out." *Id.*

111. Wealth is not the only thing on the bottom line. "Economic methods cannot supply the information necessary to justify public policy. Economics can measure the intensity with which we hold our beliefs; it cannot evaluate those beliefs on their merits. Yet such evaluation is essential to political decision making." Sagoff, *supra* note 102, at 1410. Along with the problems from the theory of second best, see *supra* note 103, and for similar reasons, economic theorists "must exclude from the calculus of pure efficiency all possibility of private preferences for principles of right or social justice as such." Frank I. Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015, 1035 (1978). On bases such as this, Kennedy leveled an attack on liberal law and economics scholars, such as Ackerman, Calabresi, and Michelman, who generate systems of private law rules by means of the efficiency criterion. See Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

112. Although the discussion of the normative considerations centers on the claims stemming from the self-paternalistic justification for government intervention, the market itself raises moral and political issues. For example, since:

and the merchant obviously have something to say. Those with moral or political claims also include consumers who prefer no self-paternalistic constraints, and, more broadly, personally disinterested onlookers from society who base their points on general principle. To facilitate the expression of these views, I engage them in a script drafted along the lines of Ackerman's neutral conversation.¹¹³ Under this procedure, citizens in a liberal democracy debate their claims to resources and powers as equals, from positions of undominated equality.¹¹⁴ When reasoning ends at basic values, and a debater resorts to the assertion of the superiority of her values or herself, the gist of the irrefutable countermove, the conversational constraint that reduces the asserter to silence, is: "Why? Am I not just as good as you are?"¹¹⁵

The cast of characters in the neutral dialogue is the self-paternalistic consumer (Consenter), the merchant and other business interests (Merchant),¹¹⁶ the interested consumer not consenting to the

real markets are not perfectly competitive, . . . their many imperfections are morally significant. . . . The many consequent benefits and costs [of competitive markets] are joint social products, not the sole responsibility of the individuals upon whom they fall. How this social surplus is to be distributed is an unavoidable problem for a theory of social justice. . . . [and not] beyond moral assessment.

Daniel H. Hausman, *Are Markets Morally Free Zones?*, 18 PHIL. & PUB. AFF. 317, 318 (1989).

113. Ackerman outlined the theory:

The germ of the idea is that nobody has the right to vindicate political authority by asserting a privileged insight into the moral universe which is denied the rest of us. A power structure is illegitimate if it can be justified only through a conversation in which some person (or group) must assert that he is (or they are) the privileged moral authority: Neutrality. No reason is a good reason if it requires the power holder to assert: (a) that his conception of the good is better than that asserted by any of his fellow citizens, or (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens.

ACKERMAN, *supra* note 35, at 10-11 (emphasis omitted). Nozick essentially agreed:

When someone raises a moral objection to something we are doing or planning, we feel we owe him an answer, a moral answer. . . . [T]he only way to respond to his requesting moral reasons or raising moral objections, the only response to it qua that, is to offer moral reasons in justification or defense of our actions, to engage, if need be, in a moral dialogue with him.

ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 469 (1981). See also SAMUEL STOLJAR, *AN ANALYSIS OF RIGHTS* 77-79 (1984) (stating that claim to right calls for response).

114. See ACKERMAN, *supra* note 35, at 17-19 (stating that while neutral dialogue begins from position of mutual equality, subsequent conversations allocate power and resources in unequal manner).

115. See *id.* at 8-10 (arguing in "constrained power talk" that one can delegitimize power structure by reducing its proponent to silence).

116. To represent all the business interests, perhaps more than just Merchant should be given a role because market competitors can level complaints against one another.

self-paternalistic move (Nonconsenter), and society at large (Onlooker).¹¹⁷

CONSENTER: Whether or not I actually make direct use of the option created by the mandatory warranty offering, this self-paternalistic intervention enlarges my autonomy and liberty. While before I was far from the position to make a fully responsible purchasing decision, now I am in a better position, better absolutely and better relative to Merchant because the differential rationality between us is less. From a deontological standpoint,¹¹⁸ the intervention reinforces my autonomy without unfairly invading the Merchant's autonomy.¹¹⁹ Out of earshot of the Sirens of the marketplace, from a fairly Archimedean point for appraisal, I prefer and consent to this self-paternalism. It materially enhances my rights. From a utilitarian or teleological standpoint, economic efficiency being justifiable in these terms, my self-paternalistic step, insofar as it promotes efficiency, brings about an increase in the good. To the extent the invisible hand operates in the political marketplace, the intervention increases also the social welfare as evidenced by the majority of us citizens who, through our representatives, advance our welfare by enacting this legislation.¹²⁰ Because the logic of col-

Ackerman, positing that the legitimacy of the "competitive power relations" in the ideal market of neoclassical economists "is hardly self-evident," stated that "The dialogic burden becomes far heavier" once one faces the imperfections outside the ideal market. Bruce A. Ackerman, *On Getting What We Don't Deserve*, SOC. PHIL. & POL'Y, Autumn 1983, at 60, 65. In light of the "whole series of market imperfections, informational disadvantages, [and] transactional rigidities. . . . How, then, are those favored by real-world markets to answer for their superior transactional position when called to account by their disadvantaged competitors?" *Id.* at 65-66.

117. Because of the pervasiveness of consumerism, the percentage of disinterested onlookers may, unfortunately, be small. This frustrates the assumption of democracy that "a substantial majority of concerned but disinterested citizens . . . will prevent policies from being shaped by those with direct economic self-interests. . . . They are to arbitrate and judge the disputes of the interested parties." LESTER C. THUROW, *THE ZERO-SUM SOCIETY* 16 (1980).

118. The basic moral theory discussed in the dialogue is elaborated in Kuklin, *supra* note 83, at 847-61.

119. In James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1617-25 (1981), the author argued that the legal refusal to enforce an unjustly enriching contract is not a denial of the enricher's autonomy. The defensible principle is that the government ought not to second-guess, by interfering with, the enricher's values as indicated by his choice of goods. But when the same goods can be obtained elsewhere at a lower price, this shows a lack of information or utilization of the market by the enricher. The government may then interfere without invading his autonomy since his conception of the good is not doubted, only his inefficient means of realizing it. Nor may the enriched party complain about invasions of his own autonomy: "The law . . . has no reason to value this exercise of autonomy" manifested by a person "enriching himself by taking advantage of the necessity or ignorance of another." *Id.* at 1619.

120. The warrant for invoking government intervention must not be summarily dismissed by language reminiscent of arguments against paternalism, such as Thurow's.

lection action cuts against us, our organized efforts to achieve this intervention reveal further the depth of our preference and commitment.

You, Merchant, have no greater moral complaint against my self-paternalistic invocation of government assistance than you would against my private attempts, unfortunately ineffective, to right the imbalance in our decisionmaking positions. Your private moral claims in both instances are groundless. You cannot maintain that you ought to have a right or entitlement per se to take advantage of the inherent and imposed differential rationality.¹²¹ That there is an inherent differential is morally neutral. I have at least as much moral right to resist my inherent disadvantage as you do to take advantage of it.¹²² Am I not just as good as you are? The fact that there is an imposed differential is not morally neutral, especially be-

Owing to advertising, for most Americans, "Physiological needs determine very few of our expenditure decisions. Individual consumers may be making silly decisions (buying products at prices higher than they need to pay), but it is hardly the appropriate role of government . . . to stop people from making silly decisions that do not affect anyone but themselves." THURLOW, *supra* note 117, at 147. First, the silly decision also affects those who are dependent on the consumer. Second, it affects and is affected by the merchant and, though the merchant will not complain, this raises moral questions about the fairness of the status quo. Third, it influences the availability and price of competitive and substitute goods, thereby affecting third parties, including other consumers and merchants. Fourth, the consumer is not saying to the government, "Stay out of this"; instead she is saying, "Help me stop making silly decisions." Elsewhere Thurow recognizes that consumer legislation is not "forced upon society by some extremely powerful minority that wants to torment the current economic system." *Id.* at 20. Instead, enactment occurs because "most of us want to be protected from our own mistakes." *Id.* Even if the silly decision bears only on the wealth of the consumer, because "income and wealth are [not then] distributed in accordance with equity (whatever that may be), individual preferences are [not] properly weighted, and the market can[not] efficiently adjust to an equitable set of demands." *Id.* at 194.

121. Much has been made of the asymmetries in a transaction between an individual and a corporation. See, e.g., JAMES S. COLEMAN, *THE ASYMMETRIC SOCIETY* 21-22 (1982) (arguing that corporate actors control much of relevant information). "[T]he corporate actor nearly always controls most of the conditions surrounding the relation. . . . The end result is that two parties beginning with nominally equal rights in a relation, but coming to it with vastly different resources, end with very different actual rights in the relation." *Id.* Coleman called for the "recognition by the law of the power disparities" by "an explicit *unbalancing* of rights, in order to balance the realization of interest among unequal parties, or else somewhat more direct intervention of the law into the exercise of rights." JAMES S. COLEMAN, *POWER AND THE STRUCTURE OF SOCIETY* 77 (1974). See also L.T. HOBHOUSE, *LIBERALISM* 47 (1911); JAMES W. HURST, *LAW AND MARKETS IN UNITED STATES HISTORY* 104-05 (1982) (discussing mortgages of farmland); Barbara A. Curran, *Legislative Controls as a Response to Consumer-Credit Problems*, 8 B.C. INDUS. & COM. L. REV. 409, 435-36 (1967).

122. "There is no Principle of Moral Inertia: there is no prima facie duty to refrain from interfering with existing states of affairs just because they are existing states of affairs." JUDITH JARVIS THOMSON, *Killing, Letting Die, and the Trolley Problem*, in *RIGHTS, RESTITUTION, AND RISK* 78, 84 (William Parent ed., 1986).

cause you are the imposer who then exploits it.¹²³ Arguably, you even have a moral obligation not to exploit your inherent advantage over me.¹²⁴ You use me as a means only to your own ends.¹²⁵

MERCHANT: You speak too glibly, Consenter. I understand the thrust of your deontological point that I have no rightful claim to

123. Exploitation, according to Feinberg, is usually "harmful to the interests of the exploitee. Very commonly it coerces or deceives him, or takes advantage of his personal incompetence, in which cases it is not voluntarily consented to, and therefore, when harmful, is a wrong to the person it exploits." FEINBERG, *supra* note 16, at 176. For an analysis of exploitation, see *id.* at ch. 31, and for a discussion of the exploitation principle, see *id.* at ch. 32.

Put very vaguely, all interpersonal exploitation involves one party (*A*) profiting from his relation to another party (*B*), by somehow "taking advantage" of some characteristic of *B*'s, or some feature of *B*'s circumstances. When the exploitation is coercive, the characteristic of *B* that is taken advantage of is his lack of power relative to *A*, as when *A*, for example, is in a superior bargaining position. . . . The essential point is that because of something about *B*, which *A* uses in a certain way, *A* profits.

Id. at 178-179. This is usually "unfair", *id.*, but even when not unfair because of *B*'s voluntary consent, it may still be wrong. *Id.* at 181. Regardless of consent, "insofar as *A*'s profitable utilization of *B* is the consequence of manipulation, it also tends to be unfair to *B*." *Id.* at 201. The overall degree of unfairness "[depends] on how the other party was used . . ., on which traits or circumstances were utilized . . ., [and] on how gains and losses [between *A* and *B*] were distributed." *Id.* at 204 (Diagram 31-1).

124. Aristotle's commutative justice fosters a strong view of advantage-taking: "To paraphrase Aristotle only slightly, commutative justice operates on the principle that no one should gain by another's loss." Gordley, *supra* note 119, at 1589 (referring to Aristotle, *Nicomachean Ethics V*, in *THE BASIC WORKS OF ARISTOTLE* (Richard McKeon ed., 1941)). When the victim's interest is adversely affected through exploitation, Feinberg's "exploitation principle", under which wrongful gain may be legally prevented, is inapplicable only when there was "fully voluntary consent". See FEINBERG, *supra* note 16, at 211-12. As is evident from the discussion, my position is that the consumer's consent can hardly be called fully voluntary. For a libertarian argument for advantage-taking, see Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 *YALE L.J.* 472 (1980); but see Larry Alexander & William Wang, *Natural Advantages and Contractual Justice*, 3 *LAW & PHIL.* 281, 282-284 (1984) (criticizing Kronman's libertarian argument on its own terms); see also *infra* note 161 (presenting additional criticism of Kronman's analysis).

To defend the contention that differential rationality, especially when knowingly exacerbated and exploited by one of the transacting parties, creates a moral obligation, one may build on Fletcher's principle regarding the

rationale of liability that cuts across negligence, intentional torts, and numerous pockets of strict liability [A] victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant — in short, for injuries resulting from nonreciprocal risks.

George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 *HARV. L. REV.* 537, 542 (1972).

125. Feinberg asserted that "exploitation of a person is normally a way of using someone for one's own ends, which is somehow wrongful or blameworthy, whether it wrongs the other person or not." FEINBERG, *supra* note 16, at 177; see Kuklin, *supra* note 2, at 1007 n.371 (mustering views of Feinberg, Kronman, Raz, Sunstein and others on exploitation and related notions).

impose purposive distortions on your actions simply because they are advantageous to me. If, however, the good, be it efficiency or whatever, is increased by such an imposition, then a utilitarian case is made out for it. Whether the warranty offering improves efficiency is a complicated empirical question that mere speculation cannot answer. This question must be left to detailed investigation. Furthermore, you gloss over too quickly your right to resist inherent disadvantages that are not caused by me. I am not at fault for them, why should I be constrained because of them? I, like everyone else, have a just claim to the gains from life's lottery.¹²⁶ Am I not just as good as you are?

CONSENTER: Yes, Merchant, while you reap systematic gains because there are costs perceivable to you that are misperceived by me, I concede that the existence of this inherent condition is not your fault. On the other hand, your consequent gains cannot be said to result either from my fault¹²⁷ or your desert, in that you have

126. [T]he question that most seriously divides liberals and separates the welfare-statists from the libertarians . . . [is] the question of whether one is morally entitled to the fruits of one's good fortune in life's natural lottery of endowments and opportunities in the face of claims of superior need due to misfortune

Larry Alexander, *Liberalism as Neutral Dialogue: Man and Manna in the Liberal State*, 28 UCLA L. REV. 816, 816-17 (1981). The most famous argument from the libertarian wing is Nozick's "Wilt Chamberlain" hypothetical in which injustice cannot be asserted if Wilt is allowed to keep the proceeds from those who choose to pay to see him perform. See NOZICK, *supra* note 56, at 160-64 (illustrating that patterned end-state principles may be thwarted by people voluntarily transferring some of shares they receive under principle). Rawls, a liberal, insisted that one deserves neither one's native endowments, initial starting place in society, nor even one's superior character. See RAWLS, *supra* note 4, at 104; but see GEORGE SHER, DESERT 22-36 (1987) (criticising Rawls' analysis). Rawls kept the original social contractors behind a veil of ignorance regarding their natural endowments as a means to prevent them from exploiting their endowments to the disadvantage of the less gifted. See RAWLS, *supra*, § 24. Likewise, Ackerman disallowed the power holder from claiming in a neutral dialogue that "he is intrinsically superior." See ACKERMAN, *supra* note 35, at 10-11 (quoted *supra* note 113).

127. Bennett began his defense of this proposition by stating that the choice to study esoteric subjects, "rather than the details of the automobile or refrigerator markets," does not make one "at fault in any way. Even if I were to devote all my time to rationalizing my consumption, it is not clear that I could succeed." John G. Bennett, *Ethics and Markets*, 14 PHIL. & PUB. AFF. 195, 203 (1985). It is hard enough "to deal rationally with the major outlines of one's life," such as marriage, divorce, childbearing, and career choice; "We can't expect the details of consumption to be handled ideally." *Id.*

Even if the consumer fails to protect herself as much as is reasonable or efficient, and thus in some sense might be blameworthy, it doesn't follow that the law should not protect her. The benefits of the law are not simply rewards for good behavior. Some are designed to protect "those who will not look out for themselves" Gregory Vlastos, *Human Worth, Merit, and Equality*, in MORAL CONCEPTS 141, 145 n.1 (Joel Feinberg ed., 1969); see also Kuklin, *supra* note 83, at 858 n.35 (noting that law of fraud exists to protect the foolish).

not earned the windfall advantage. Thus, there is moral neutrality.¹²⁸ Our dealings do not meet the standard economic model of two transactors, each truly knowing her own valuation of the goods, increasing their individual utilities by bargaining at arm's length over a sale price somewhere between the two valuations. When I enter the marketplace aware of your advantage, I still am not able to bargain reasonably with you over surrendering it. Admittedly there is a regressive quality to this point, but, in the end, you must agree that the very asymmetry in question prevents rational utility maximization by me through bargaining because I am unable to know sufficiently well beforehand the range of the actual value to me of the disadvantage.¹²⁹

To make my moral case another way, suppose I could hoist myself to an even footing with you entirely without help from others. Assume, for example, that technological advances allow me to walk into your establishment with a small computer that generates accurate costing data for each of your goods. You could not complain of unfairness. Even if this computer (with voice synthesizer) nagged me out of succumbing to my weakness of will, overdiscounting long term benefits in favor of instant gratification, and so forth, you still would be held to silence. When one adds to the circumstances the

128. Not only does neither party have a fault or desert claim against the other in this case, but also they have no claim against society in general, according to Baker. See C. Edwin Baker, *Counting Preferences in Collective Choice Situations*, 25 UCLA L. REV. 381, 397-98 (1978) ("[O]ne normally has no right to demand that the human world have a particular content . . ."). Beyond a right to equal treatment, no person can claim that society owes her resource allocation rules personally more advantageous. *Id.*

129. Fried discussed the problem of bargaining and moral foundations, mainly in the context of fraud. See CHARLES FRIED, *RIGHT AND WRONG* 100-04 (1978).

Fraud might be viewed as simply a lack of equality in respect to an initial endowment of information . . . My objection is that the central validating process of bargaining in EAR [economic analysis of rights] must assume some background entitlements which guarantee the integrity of the bargainers as intelligent, free agents. Without this background, exchanges between individuals cannot be described as bargains or exchanges at all.

Id. at 100. Fried was uneasy and suspicious about the notion that one, aware of one's ignorance, can bargain for the information. *Id.* at 101. The assumption that one is the best judge of one's own welfare "makes the possession of knowledge and the capacity to reflect upon it not the subjects of bargaining but the foundations for bargaining." *Id.* Without the foundations, "the result of a process of bargaining can no longer be seen as validating anything [here, validating the results of the bargaining as efficient]." *Id.* at 102. "What we have, in short, are pretheoretic goods, or *rights*, assumed to be necessary if the theory is to work at all." *Id.* The calculations based upon the lessons from the studies of choice under risk and uncertainty may help the consumer somewhat as a practical matter, see Kuklin, *supra* note 2, at 973-79, but they strike me as not resolving the moral issue of whether the consumer ought to be relegated to such a probabilistic expedient when the merchant need not, or at least, need not as much.

fact that you often lead me into temptation with various ruses, to say nothing of the puffing and avoidance tactics which verge into non-disclosure and misrepresentation, you must remain silenter still.¹³⁰

NONCONSENTER: You, Consenter, may well have the moral right with respect to Merchant to resist its advantage, but the form of your resistance impacts on me. Because I neither cause your disadvantage nor receive any benefit from it, what moral right with respect to me do you have to counter it in a manner that disfavors me? You object to invasions of your autonomy, but by this legislation you are invading mine.¹³¹ My preferred package of goods does not include the increased quality and other supposed gains that flow from proffered warranties.¹³² I like the availability of nonwarranted

130. In discussing very unequal contracts, Hobhouse pitted the "sufferer . . . beset with a fiend within" against the cool "tempter", and found "a form of coercion here which the genuine spirit of liberty will not fail to recognize as its enemy, and a form of injury to another which is not the less real because its weapon is an impulse which forces that other to the consent which he yields." HOBHOUSE, *supra* note 121, at 81. Even if we decline to treat the marketplace as coercive, as noted before, it is still difficult to claim that the consumer has fully consented to the contract. See generally O'Neill, *supra* note 23. Machina stated a point related to Hobhouse's with charged words: "Cynical manipulation of information and attitude-forming materials in an attempt to deceive potential buyers into parting with their money is a thinly disguised form of stealing practiced by some advertisers." Kenton F. Machina, *Freedom of Expression in Commerce*, 3 LAW & PHIL. 375, 392 (1984). Even when the deception fails, the "attempted theft" remains. *Id.* "Commercial expression has tremendous potential for abuse in this way, and such abuse runs directly counter to the rights of potential buyers on almost anyone's view of those rights." *Id.*; see also KLEINIG, *supra* note 7, at 188 (owing to difficulty of determining fraud, there is nonpaternalistic argument from fraud protection that supports minimum quality and safety standards).

131. This response will engender debate: "Coercion is justified when it is part of a general scheme for expanding the range and power of the will of each person. One may control the will of another only if that is justified somehow by an expansion in will." Hugh Gibbons, *Justifying Law: An Explanation of the Deep Structure of American Law*, 3 LAW & PHIL. 165, 170 (1984).

132. See Kennedy, *supra* note 4, at 598. Kennedy noted four groups of buyers that are affected:

- (1) there are those whose risk preferences and valuations have been overruled, who end up paying for precautions they don't want; (2) there are, possibly, buyers who wouldn't pay the full costs of the precautions but are delighted to get them at a reduced price because of incomplete pass-along; (3) there are those who have the same risk preferences as the state but figured that they could avoid accident losses more cheaply through their own precautions than through the seller's; and (4) there are those who are priced out of the market and purchase their next most favored good rather than this one.

Id. at 652-53. Elsewhere, Kennedy raised the "inherently political questions" of whether society is fair to those in groups (1), (3) and (4). See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1759 (1976). Moreover, "supposing that we can eliminate disclaimers without causing a fully compensating price hike, is it either ethically or economically *desirable* thus to shift the balance of economic power toward the consumer at the expense of the manufacturer?" *Id.* For more along

goods. One, they usually have a cheaper price tag and I prefer to have money in my pocket up front.¹³³ Two, I am more careful than most people and don't need the additional protection.¹³⁴ Three, I enjoy searching for information about the quality of goods, but the warranty offering will decrease the payoff and therefore my pleasure.¹³⁵ Four, I can take precautions against defects more cheaply than can Merchant.¹³⁶ Five, I am a do-it-yourselfer who relishes making repairs myself. Six, even when I don't fix them myself I can get cheap repairs elsewhere (e.g., from my brother-in-law, the handyman). Seven, I already have an inexpensive insurance policy that covers the risks.¹³⁷ Eight, insurance or not, I am a risk preferer who likes the thrill of assuming risks.¹³⁸

The net result of the differences in consumers' costs and preferences is that the goods cost some of us more than others, or the goods provide less satisfaction. While your proposed intervention may narrow this range, it forces me to pay more than before, perhaps effectively more than you will end up paying because fewer of my preferences will be met. I may even be priced out of the market altogether.¹³⁹ It is not fair to me that I must pay more or achieve

the lines of this last question, see Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 625-33 (1983).

133. See Schwartz, *supra* note 21, at 30 n.41.

134. See Kennedy, *supra* note 4, at 651.

135. Information collection and processing raise transaction costs. By reducing information costs through the proffered warranty, the consumers for whom these costs are low (or negative) will lose at least some of their relative advantage (or opportunity), thereby redistributing wealth from these consumers to those with high transaction costs. See Schwartz, *supra* note 21, at 31-32. Moralisms also abound, for example: "For your laziness in not investigating the safety of those goods, you deserve the injury." See *id.* at 32.

136. See Kennedy, *supra* note 4, at 651 (stating that to cope with risk, consumer "might plan to modify the product himself for less . . .").

137. See *id.* at 651; Schwartz, *supra* note 21, at 30 n.41.

138. See Sunstein, *supra* note 7, at 1168-69. On the reasonability and voluntariness of assuming risks, see generally FEINBERG, HARM TO SELF, *supra* note 4, ch. 20; Eric Von Magus, *Preference, Rationality, and Risk Taking*, 94 ETHICS 637 (1984). The difficulty in discerning the basis of the risk preference is reason for caution, "But if it is clear that irrational discounting is occurring, and if the short-term costs of intervention are small, government action is justified." Sunstein, *supra*, at 1169.

Speaking of risk preference, Calabresi did not forget the thrill-seeking producer: "If we have *caveat emptor*, consumer liability, then the poor producer who wishes to take a risk of a product which causes injury, because he likes to take risks, is deprived of that opportunity." *Transcript*, *supra* note 5, at 121 (comment of Guido Calabresi).

139. Partially rebutting this argument, Kleinig contended that the weak bargaining power of the poor must be taken into account: "Their preparedness to shoulder the risks associated with an inferior product may signify not a 'best buy' so much as an 'only buy.' Is it fair that the only option available is a fairly unreliable or unsafe product?" KLEINIG, *supra* note 7, at 190. Low interest loans or subsidies may be the proper societal response to higher price tags. *Id.*

less satisfaction so that you can get more of what you want.¹⁴⁰ My preferences and position of cost advantage are fair, reasonable, and sensible. Why should I lose out simply because I am in the minority? Am I not just as good as you are?

CONSENTER: I admit, Nonconsenter, that, all else equal, I have no greater moral claim to my preferred package of goods than you do to yours. But the tragic fact is that we both cannot have our preferences fully satisfied.¹⁴¹ The economies are to the contrary. I have done nothing to lose my claim, and you have done nothing to earn yours. The fact that the availability of your preferred mix of goods is a secondary effect of the imperfections in the marketplace gives you no moral claim to it. As between you and me, your benefit from the status quo is a matter of chance. This benefit is a morally neutral contingency. If all of us consumers are ignorant about exactly what we will get when we purchase goods — we all shoot in the dark in estimating costs and benefits — you, as a winner of this lottery, would be hard pressed to assert that you deserve to win more than me, one of the unlucky. One does not have a moral claim to the payoff from a gamble (i.e., regarding the availability and, perhaps, subsidization of one's preferred goods) against one who neither chooses to gamble¹⁴² nor consensually accepts benefits from the game.¹⁴³ If your fortunate edge in gaining what you prefer is due to nature, that is, you are endowed with superior talents or I am

140. Kleinig turned this argument against Nonconsenter. While some persons may truly prefer the excluded goods and services, "it is arguable that they would most often be purchased as a result of ignorance, mistake, or weakness of bargaining power. It might also be suggested that it is only because the producers/sellers can rely on such sales that the goods and services in question remain economically viable." *Id.* at 189.

141. The word "tragic" evokes the more distressing lessons of the renowned work, GUIDO CALABRESI & PHILLIP BOBBITT, *TRAGIC CHOICES* (1978). While far short of a matter of triage, the lawmaker, depending on the market, may have to overrule some consumers' preferences, for example, either the preference for lower prices despite harsher terms, or the preference for nonharsh terms despite higher prices. Then may come this conclusion: "Put another way, regulation prevents consumers from making informed decisions between contract terms and prices." Schwartz & Wilde, *supra* note 59, at 667. I would not put it this other way, since I insist that without regulation consumers make only partially informed decisions, and even with the proposed regulation they remain far from fully informed.

142. It is morally untenable for one to consent to a gamble, that is, the rules of a game, and thereafter attempt to regain sustained losses. See JOEL FEINBERG, *HARM TO OTHERS* 35-36, 115-16 (1984). But the issue here is over which rules are actually, or should be, consented to.

143. Under the circumstances one should not apply the "principle of fairness" of H.L.A. Hart and Rawls whereby moral claims can be made against one who accepts benefits from an overall "just, mutually advantageous, cooperative venture," e.g., the market. See NOZICK, *supra* note 56, at 90-95 (rejecting principle of fairness in all circumstances). In this day and age, how can one rationally decide to decline the benefits of the market, most certainly for necessities, but also for luxury goods,

endowed with inferior ones, most ethicists would reject the claim that you deserve the fruits of your natural traits or I deserve the spoilage of mine.¹⁴⁴ You may be allowed to keep your fruits because it is to the overall benefit of society, but you do not deserve them since you have not earned them. Finally, if the original difference between us is due to nurture, for example, because you have been trained to be more diligent about, or obtain pleasure from, informational research, or because you have been disciplined against succumbing to temptations and other decision-biasing influences, still your complaint would ring hollow against me as someone who is rationally endeavoring to overcome my poorer nurturing. You have no moral claim to the benefits of having had virtuous caregivers.¹⁴⁵

I may grant, however, that you do deserve the advantages of character traits which are a product of your own efforts.¹⁴⁶ In so much as you are a self-made person who has refined the clay of nature and nurture through the sweat of your brow, consequently overcoming hurdles faced in the marketplace, or in so much as you have reformed your preferences to conform to the available goods, you indeed may have earned the payoff. But if I grant this, it also applies to me. One of the main reasons I am seeking government intervention is to overcome the result of my own weaknesses. I admit there are other ways to do some of this without impacting on you. For example, I could undergo psychotherapy to become disenchanted of attractive spokespersons or to become risk preferring. Not all plausible steps are as silly as this, nevertheless, most approaches are inefficient or character-altering with possibly negative spillovers (e.g., I do not want to be the kind of person who can stand the drudgery of poring over technical literature), and none will rectify all my disadvantages, some of which have nothing to do with efficiency or character traits. Though I think it probable that the availability of your preferred goods in the existing marketplace does not

especially when the benefits of the luxuries are unclear to the consumer and the merchants have worsened the murkiness?

144. See *supra* note 126 (discussing whether one is morally entitled to one's endowments and initial position in society).

145. Do the caregivers have a claim on behalf of the advantaged consumer? If their virtue of superior caregiving is a product of chance, nature, or nurture, then no. Without examining the regressive aspect of this point, one might ask: Is there no place for desert? Finessing the labyrinths of freewill and determinism, compatibilism, and incompatibilism, see generally DETERMINISM AND FREEDOM IN THE AGE OF MODERN SCIENCE: A PHILOSOPHICAL SYMPOSIUM (Sidney Hook ed., 1958); MORAL RESPONSIBILITY (John M. Fischer ed., 1986), I find some place for desert in the next point.

146. See, e.g., SHER, *supra* note 126, at 23. Rawls denied this is possible. See *id.* at 23-25.

result from prior efforts by you to become self-made, it is conceivable that it does. In any event, perhaps I am self-making myself, to some extent, by my efforts at trying to obtain government assistance in mandating the warranty offering (assuming my caregivers did not instill this in me). Must we debate whether my efforts at becoming self-made are greater than yours, however this is measured?¹⁴⁷

In particular instances, the self-paternalistic intervention might facilitate your preferred purchases and frustrate mine. Logs may roll between us.¹⁴⁸ Regardless, you could not rightfully object if I solved the economic and other problems of private self-paternalism. If I did solve them, the economies may result in merchants offering my preferred mix of goods and not yours. I am not paternalizing you. I recognize the validity of your preferences and the importance of allowing you to pursue them. But the same validity and importance obtains for me. In this regard, we are in a zero-sum game: you get what you want or I get what I want.¹⁴⁹ Though my proposed

147. With respect to claimed rights, Sher wrote that this debate is superfluous because effort alone does not give rise to rights: "To say that a hard worker deserves something is not to say that anyone is obligated to provide him with it, to refrain from interfering with his efforts to obtain it, or to prevent anyone else from interfering with those efforts. In itself, diligent effort creates no entitlements." *Id.* at 54 (footnote omitted).

148. Tullock discussed rule changes "that will make everyone better off *ex ante*," that is, prospects are generally improved even though some persons will actually end up worse off. Gordon Tullock, *Two Kinds of Legal Efficiency*, 8 *HOFSTRA L. REV.* 659, 663 (1980). "Still, *ex ante* everybody benefits and rational persons would choose the improved law simply because it gives them a better gamble, even though as a matter of fact they may lose that gamble." *Id.* What of the merchant? It may not be better off *ex ante*. "Lastly, however, and this is the most difficult problem, there may be changes in the law that benefit some yet directly injure others. The first thing to be said about such changes is that every effort should be made to minimize resulting injuries." *Id.* With this I agree, as my defense of the mandatory warranty offering indicates. My contention, nonetheless, is that the merchant, although harmed in some sense, is not legally "injured." *Cf.* Kuklin, *supra* note 108, at 17 n.55 (distinguishing "harm" from "injury"). The merchant may be worse off, but the loss is not one to which it can morally claim an entitlement, even if there is an efficiency loss.

149. *See* CALABRESI, *supra* note 5, at 13 ("I cannot tie myself to the mast without also tying you. . . . Either way, compulsion is inevitable."). The first of Sunstein's categories of cases, sometimes understood as paternalism, *see supra* note 10, is when "a majority may have a collective preference; the public, acting through government, may attempt to bind itself against the satisfaction of its own misguided choices." Sunstein, *supra* note 7, at 1138. In justifying this category, which is "quite different from ordinary paternalism or from a system in which majorities impose their will on minorities because they disapprove of the conduct in question," *id.* at 1141, Sunstein argued that:

The foreclosure of the preferences of a minority is unfortunate, but in general it is hard to see what argument there might be for creating an across-the-board rule against self-binding through politics. . . . [T]he choice is between the preferences of the majority and those of the minority . . . [but since it] will interfere with minority desires, . . . it should for that reason be permitted only when less restrictive alternatives,

intervention is not ideal, it is better than none.¹⁵⁰ Why should I capitulate?¹⁵¹ Am I not . . . ?

ONLOOKER: Even if Merchant has no personal moral claim against you, Consenter, to benefit from the outcome of your asymmetrical rationality, I shall advocate the commonly held view that you have no proper claim to interfere with the status quo in the way you have chosen. While, all else equal, I generally favor proposals that would help you get what you want,¹⁵² all else is not likely to be

including private arrangements and limitations to those who wish to be bound, are impossible or ineffective.

Id. at 1142; see also KLEINIG, *supra* note 7, at 110-11 (urging least restrictive alternative to minimize spillovers of self-paternalism). One of the cases in which the codification of second-order preferences is weakest is where "the second-order preference reflects some special weakness on the part of the majority," for example, a curfew law to keep the peace among the warring majority. Sunstein, *supra*, at 1143. Our situation is endemic, and not a product of "some special weakness." Another problem according to Sunstein is in discerning when the majority's motivation is self-paternalistic rather than paternalistic. See *id.* at 1143-45.

150. In light of the ubiquity of take-it-or-leave-it contracts, consumers regularly being "contract terms takers," Goldberg proposed the appointment of an agent, possibly the legislature or its delegate, who would aid consumers in the creation of standardized contract terms. Goldberg, *supra* note 29, at 76. For some of the reasons discussed here, Goldberg recognized that not all consumers would benefit, or benefit equally, from such an arrangement. See *id.* He responded with the question: "But how might the[] [results] compare to the 'no government' case in which the legislature delegates the task of determining the standardized terms directly to the firm?" *Id.* at 76-77.

151. Kleinig called this the "collective good" argument. KLEINIG, *supra* note 7, at 191-92. Feinberg contended that consumer protection laws are not paternalistic, even with respect to the minority of consumers who disapprove of them,

if the implicit rationale of the law — the account of its role, function, and motivation that most coheres with the known facts — is to enable the majority to secure its goals, not to enforce prudence on the unwilling minority. . . . Where alternative arrangements that would satisfy both groups at tolerable [administrative and economic] cost are obviously available, then the interpretation of the 'implicit rationale' as paternalistic gains plausibility.

FEINBERG, HARM TO SELF, *supra* note 4, at 21. See also *supra* note 19 (motives for action); cf. FEINBERG, *supra* note 16, at 58-59 (discussing legislative adjustment of unavoidably opposed interests based upon relative importance). G. Dworkin agreed with Feinberg, using water fluoridation as an example, the relevant conditions being that the majority interest is important, the imposition on the minority is relatively minor, and "the administrative and economic costs of not imposing on the minority would be very high." Dworkin, *supra* note 26, at 110. He concluded with a caveat: "However, fairness requires that if there are economic costs to the minority (such as purchasing nonfluoridated water), they should be borne by those who gain." *Id.* In the situation under consideration, how could the consenters compensate the nonconsenters? Shapiro also argued that the case of fluoridated water is not one of paternalism. See Shapiro, *supra* note 7, at 526.

152. Onlooker is not being paternalistic:

Even when *A* does not stand to benefit at all, action with respect to *B* is not paternalist if *A*'s purpose is to facilitate an efficient result or to give *B* something that *B* clearly wants but cannot obtain without help. An

equal. Government intervention involves matters of basic principle, including distributive justice and political theory, and the practical effects are often problematic, nay, downright perverse. Yes, it seems unfair for Merchant to take advantage of your inherent transactional impediments, let alone the imposed ones, yet, nevertheless, it may be wrong for you to respond, not by private counteraction, but by summoning the aid of the government. There are many objections to intervention.

To begin with, the government apparatus is costly, offsetting the purported improvement in market efficiency.¹⁵³ Even when the appropriateness of intervention is beyond dispute, the government's instrumentalities operate with such imprecision that unanticipated negative consequences usually occur. Your personal situation may even be worsened because, historically, when industries are regulated by agencies, the industries typically capture the regulator and ultimately benefit from the intervention.¹⁵⁴ Ongoing regulation creates uncertainty which produces inefficiency.¹⁵⁵ Because many of the costs of regulation are usually externalities that are not reflected in the price of the regulated transaction, whether efficiency gains are obtained is difficult to discern. Overall, from a utilitarian standpoint, the undesirable, unforeseen repercussions usually outweigh all but the great, substantially certain gains.¹⁵⁶

From a deontological standpoint, by mustering the united power of society against Merchant, you jeopardize everyone's autonomy

example of the former is a warranty implied in law if the warranty is (a) based on the belief that the seller is normally in the best position to detect and to insure against any defect and (b) one that the parties to a transaction are free to reject for whatever reason they choose.

Shapiro, *supra* note 7, at 526.

153. *But cf. supra* note 100 and accompanying text (discussing cost of law reform).

154. Coase made this point while attacking the intervention proposed by Goldberg, *supra* note 29 (discussed *supra* note 150). See Ronald H. Coase, *The Choice of the Institutional Framework: A Comment*, in *THE ECONOMICS OF CONTRACT LAW*, *supra* note 29, at 77, 78; see also *infra* note 186 (discussing capture theory of regulation). Goldberg was satisfied that the net result of regulation is better than none. See *supra* note 150.

155. On the inefficiency resulting from uncertainty, see, e.g., Issac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 *J. LEGAL STUD.* 257, 262-71 (1974); see also Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 *J. LEGAL STUD.* 399, 402-06 (1973); but see Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711, 759-62 (1980); cf. Jon Elster, *Taming Chance: Randomization in Individual and Social Decisions*, in 9 *THE TANNER LECTURES ON HUMAN VALUES* 105, 110 (Grethe B. Peterson ed., 1988) ("It is true that uncertainty makes it difficult to plan for the future, but without uncertainty we might not even want to plan for the future at all.").

156. Overtones of Burke are heard in this plaint. See generally EDMUND BURKE ON GOVERNMENT, POLITICS AND SOCIETY (Brian W. Hill ed., 1975). One need not be a utilitarian to agree.

with the spectre of the tyranny of the majority. By rationalizing the regulation of the marketplace in this way, you tread on the slippery slope which offers little resistance to further incursions.¹⁵⁷ Taking this step desensitizes your compunctions, perceptions and reasoning about imposing moralisms to enforce other restrictions.¹⁵⁸ Now you take aim at the marketplace, but where will it end?¹⁵⁹ Government power, like other power, corrupts and grows, leading to self-aggrandizement and abuse of discretion.¹⁶⁰ Look around, who can deny it?

All members of society have at least a *prima facie* right to be free from government intervention. The status quo, in this case the absence of intervention, raises legitimate expectations that warrant protection. You, Consenter, are the plaintiff with the burden of proof. One can quite reasonably judge that you have not met it. If not, you are wrong to beckon the government, even if Merchant is wrong to take advantage of you. Two wrongs do not make a right.

CONSENTER: You thrust many points for me to parry. About the utilitarian assertion of the bad outweighing the good, I have little to say. If it is shown that more good, say, an overall increase in personal preference satisfaction, eventuates from allowing Merchant to take advantage of differential rationalities, then your utility argument is potent to some commentators.¹⁶¹ This is an empirical affair that is resolved only by astute analysis and field study. But irrespec-

157. See, e.g., KLEINIG, *supra* note 7, at 190-91.

158. The fallacy of composition looms, whereby one cannot assume a whole set of interventions is compatible with a well-functioning market just because each member of the set alone is compatible. See BUCHANAN, *supra* note 1, at 25 ("From the fact that each grain of sand in a mountain of sand is light it does not follow that the mountain is light.").

159. The intervention may set a precedent later proving unfortunate. See ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 183-84 (1957). Party politics is not the complete solution. See *id.* at 160-62 (discussing conflicts between party and individual rationality). Hayek believed that the institutions designed to protect individual freedom from progressive encroachment by the government are insufficient. See I FRIEDRICH A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 55 (1973). Finnis warned of the slippery slope: "'I wish someone had stopped me from . . .': if this can rationally be said (as it can), it follows necessarily that even the most extensive and excessive programme of paternalism might be instituted without denial of equal concern and respect to anybody." JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 222-23 (1980); but see Wojciech Sadurski, *The Right, the Good and the Jurisprude*, 7 *LAW & PHIL.* 35, 52-54 (1988) (rebutting Finnis on basis of his failure to distinguish between "equal concern" and "equal respect").

160. For brief discussion with citations, see Kuklin, *supra* note 83, at 882.

161. Kronman advanced a "paretian" argument, allegedly consistent with libertarianism (a nonconsequentialist, rights-based orientation), that a kind of advantage-taking is justified if most people suffering the disadvantage will be better off in the long run. See Kronman, *supra* note 124, at 484-85. The libertarian subscription to this approach is disputed mainly on the grounds that individual rights cannot be

tive of this bottom line, the consequentialist justification does not overcome my claim. While some theorists have heard the death knell of this Benthamite morality, I concede that the reported demise is greatly exaggerated. Nevertheless, the dominant moral suasion today is rights-based deontology, which I mainly rely on. Kantian morality supports the strong intuition, undermined by utilitarianism, that persons are not to be used as a means only to another's or society's ends, in other words, that rights trump utility.

I agree that intervention is a mixed blessing. Still, attending to utility, I contend on the grounds of the tradeoffs I addressed already that the goods most likely outweigh the bads.¹⁶² Let us pursue this question with subsidized review. Meanwhile, if one can synthesize or commensurate moral theories, even if there is economic loss, this loss is dominated by the gain in basic fairness and justice. Because I represent the majority of consumers, any interference with the liberty of Merchant and Nonconsenter — the “liberty” of the exploiting Merchant reeking of “license” — is subordinate to the gain in my material freedom and substantive equality.¹⁶³

About your deontological claim that it is wrong for me to seek government assistance, I must point out that by this move I am not running afoul of Kant's categorical imperative. I am not treating Merchant or Nonconsenter as a means only to my own ends, nor am I violating the universalizability principle. First, the end being sought is the achievement of consumer autonomy. Individual autonomy is the pretheoretic, antecedent requisite of individual rights. To put it another way, talk of (autonomous) persons using other (autonomous) persons as means only to their own ends presupposes autonomy. For the person who is denied full autonomy by inherent or imposed conditions, or at least denied autonomy equal to the other interactor, means to ends are not involved in the establishment of increased or equivalent autonomy. Instead, the actions are means to beginnings. Until I am in an autonomous state, or sufficiently so, I am not capable of satisfactorily judging which potential ends to embrace, to say nothing of the means to achieve them. As I

sacrificed for group benefits. See Conrad A. Johnson, *The Idea of Autonomy and the Foundations of Contractual Liability*, 2 *LAW & PHIL.* 271, 292 (1983).

162. Does the uncertainty of the overall consequences destroy the argument for self-paternalism? Cf. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 114 (1985) (“Some uncertainty must be tolerated at the edges; sound social institutions will never stand or fall on the marginal classification issues that test every legal doctrine.”).

163. The hard tradeoffs are unavoidable. “Liberty and equality are often at odds with one another, as are liberty and security, or prosperity and justice.” Anthony Quinton, *Introduction*, in *POLITICAL PHILOSOPHY*, *supra* note 4, at 17.

contended before, my endeavor to expand my own autonomy does not unjustifiably interfere with the autonomy of Merchant or Non-consenter. Therefore, even though my self-paternalistic endeavor may redistribute wealth from them to me, the end in mind is not to obtain the shift in wealth, possibly in the name of distributive justice,¹⁶⁴ but rather it occurs as a secondary effect of my expansion of my own autonomy. The wealth they might lose from the intervention is not wealth they deserve. Nor, prior to the intervention, do I deserve to lose wealth to them, particularly pertaining to that lost from Merchant's exploitation.

Second, the standard under which I seek intervention does not run afoul of Kant's universalizability principle. I am quite content with the universalized maxim whereby the government is to rectify the imperfections in the marketplace that impinge on autonomy. That this can be done justly is the force of much of my argument.¹⁶⁵ There is nothing self-defeating or self-contradictory about the maxim.

The slippery slope argument that the government cannot be trusted to maintain an appropriate balance once it intervenes is, as always, formidable.¹⁶⁶ Indeed, the risk of slippage exists, but one should not make too much of it. "Can" does not imply "will." By referring to instances of abuse, nay-sayers can raise a sword of Damocles over any government action, including that which is aimed at remedying manifest injustice. The slippery slope argument is too powerful. For example, once we allow the government to criminalize homicide, this facilitates the machinations of overzealous legislators who will then slide down the slope by rationalizing the criminalization of such lesser offenses as, say, arson, and then burglary, littering, nose-picking, and the failure to smile when passing a police officer.¹⁶⁷ Where will it all end? I am being facetious, of

164. Kronman contended that paternalistic limitations to contractual freedom, e.g., "refusing to permit the voluntary waiver of certain warranties, such as the warranty of habitability, follows from the idea that in some circumstances a prohibition of this sort may be an essential part of a program of distributive justice." Kronman, *supra* note 7, at 770. For his defense, see *id.* at 770-74.

165. Rawls, the Kantian, in remarking on economic systems, asserted that "market failures and imperfections are often serious, and . . . lack of information, external economies and diseconomies, and the like must be recognized and corrected." Rawls, *supra* note 4, at 272.

166. See generally Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985). "A slippery slope argument claims that permitting the instant case — a case that it concedes to be facially innocuous and that it linguistically distinguishes from the danger case — will nevertheless lead to, or increase the likelihood of, the danger case." *Id.* at 369.

167. This verges into "the argument from added authority" which Schauer distinguished from the slippery slope argument. See *id.* at 367-68. It posits "that

couse, but not altogether. Reasoning such as this grounds the minimal government of the nightwatchman state libertarians,¹⁶⁸ and even unabashed anarchy.¹⁶⁹ While few citizens wish to push the point this far, the argument certainly merits serious attention. This is one reason why I have proposed merely the mandatory offering of a warranty. It is far up the slope of intervention, and it is justifiable on a pretheoretic autonomy basis and possibly on efficiency grounds, without reference to paternalistic or distributive motivations. While indeed this is a step on the slope, a suitable toehold can be carved. Itself, the required warranty offering will not slide imperceptibly. A warranty is a familiar instrument with a well-circumscribed reach.¹⁷⁰ Once experience has been gained with this regulation, the legislature may consider further steps. Prudence will require the search for toeholds. How far will this go?¹⁷¹ I answer with Cardozo, who responded to a slippery slope argument by stating that the courts will draw the necessary line "by considerations of convenience, of utility, and of the deepest sentiments of justice."¹⁷²

Expectations of nonintervention are, I contend, not legitimate. Typically stemming from the prior state of nonintervention, they have no legitimacy beyond that provided by the status quo itself, which is insubstantial.¹⁷³ First, moral arguments to preserve the sta-

granting additional authority to a decisionmaker inevitably increases the likelihood of a wide range of possible future events, one of which might be the danger case." *Id.* at 367.

168. Nozick contended "that [only] a minimal state, limited to the narrow functions of protection against force, theft, fraud, enforcement of contracts, and so on, is justified." NOZICK, *supra* note 56, at ix. He championed private mutual-protection associations. See *supra* note 56 for a discussion of such associations.

169. See, e.g., WOLFF, *supra* note 27.

170. R. Dworkin cryptically noted that this counter "depends not on the slippery slope but on that different weapon, the bright line (or absence of the same)." RONALD DWORKIN, *Do We Have a Right to Pornography?*, in *A MATTER OF PRINCIPLE* 335, 414 n.3 (1985). Schauer distinguished "the argument from excess breadth" from the slippery slope argument. See Schauer, *supra* note 166, at 366-67. "The problem of excess breadth can be remedied by narrowing the principle wholesale until it no longer includes the danger cases, or by specifically designating the danger cases as exceptions to the stated principle. . . . It is not a response, however, that defeats a slippery slope objection" *Id.* at 366.

171. "The classic response is, not unexpectedly, from Holmes. '[W]here to draw the line . . . is the question in pretty much everything worth arguing in the law.' Irwin v. Gavit, 268 U.S. 161, 168 (1925)." Schauer, *supra* note 166, at 380 n.52.

172. BENJAMIN N. CARDOZO, *THE NATURE OF JUDICIAL PROCESS* 149 (1921) (regarding hardships from retrospective effects of judge-made law). For an argument that, rather than capitulating to the imperfections of the invisible hand by total retreat from the slope, the line must be drawn somewhere, see KLEINIG, *supra* note 7, at 191. Schauer noticed a self-paternalistic aspect to the basic argument. "At times slippery slope arguments may be pleas to decisionmakers to fear their *own* weaknesses." Schauer, *supra* note 166, at 374.

173. See *supra* note 122 (discussing moral inertia).

tus quo generally favor the powerful against the weak, the ins against the outs,¹⁷⁴ and therefore often come down to special pleading by special interests. Second, reasonable expectations reflect the common knowledge that the law is far from static. This condition is evidenced by the modern trend of regulation and, if unsuccessful or out of political fashion, deregulation, and then, perchance, reregulation. In our dynamic society the status quo is change.¹⁷⁵ Third, reliance upon the continuation of the existing state of affairs is unwarranted when, as here, the status quo gives rise to inherent and imposed unfairness, inefficiency aside. In a just society, expectations based upon the endurance of pockets of injustice are not legitimate. In sum, the legitimate expectations and related reliance arguments are question-begging assertions, not defensible vindications of just rights.

Finally, the "two wrongs" principle is inapplicable. My self-paternalism is not a wrong in response to Merchant's wrong. Because Merchant has not treated me as I deserve, I have no obligation to treat Merchant as it might otherwise deserve.¹⁷⁶ Notwithstanding, because my action is a cautiously minimal, reasonable counter to Merchant's unfair advantage-taking, I do nothing wrong. I am not fighting fire with fire, as by taking advantage of Merchant; I am fighting fire with water.¹⁷⁷

To conclude in a less confident voice, I wish that I could offer irrefutable moral and economic arguments for my self-paternalistic invocation of government intervention. But in this context, as is

174. See J.L. MACKIE, HUME'S MORAL THEORY 154-55 (1980).

175. To put this in reductionist, law and economic terms, one could say that the cognizable value of the various vested interests includes an *ex ante* discount for the probability and extent of potential government incursions. In other words, when making an economic choice the rational person, knowing of the risk of intervention, takes the monetized risk into account and therefore suffers no legal injury when the incursion eventuates. I argue elsewhere that this analysis, by assuming "superrationality," like the slippery slope argument, is too powerful. See Kuklin, *supra* note 81.

176. A "general rule that is often endorsed . . . directs each person to treat every other as he deserves, what a person deserves here being a matter of whether he treated the person *he* treated as well as *that* person deserved. (This is not a definition of deserving but only a condition of any definition of it.)" FREDERIC SCHICK, HAVING REASONS 78 (1984).

177. Fighting fire with fire may be morally permissible, for example, in responding to the threat of violence with violence. A.W. Cragg, *Violence, Law, and the Limits of Morality*, 8 LAW & PHIL. 301, 308-09 (1989). "This view implies that those who use violence to achieve their goals both ignore and undermine the moral status of those on whom their violence impinges." *Id.* at 309. May the terms, "advantage-taking" or "exploitation," be substituted for "violence"?

plain from today's political scene, such arguments have not been found for either side of the debate.¹⁷⁸

NONCONSENTER: Yes, Consenter, despite your diffidence at the end, what you say rings with plausibility and is persuasive enough to carry the day for many, but you still have not satisfied me with respect to my principal concern as expressed by Onlooker. Even with a notched, well-delineated toehold on the slippery slope, intervention remains a crude mechanism with subtle, unpredictable and far-reaching effects, direct and indirect. When the basic issues are clear and *prima facie* rights are not in conflict, unlike our case, one may still question the overall value of whistling for the government juggernaut. The lessons of history come down strongly against you. This wolf must be kept from the door, even when you, Consenter, see it as a guard dog. The government cannot be trusted to do the good and right thing. As between Merchant and the government, the depredations of Merchant are to be feared less. It is rational to self-paternalistically fetter the irrational political and legal processes.¹⁷⁹

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As the stagelights fade, notice that crucial points of the dialogue are largely spoken past the other disputants. In advocating intervention, the consenting consumer emphasizes what might be called a first order, self-regarding stance. The argument is mainly one-to-one. To recapitulate, Consenter says: "The circumstances of the marketplace produce or facilitate an asymmetry between you, Merchant, and me in the conditions for responsible action. Because I cannot rationally counter these circumstances either individually or by private group efforts, for this reason alone I am not at fault for my disadvantage and do not deserve the ensuing harm. Inasmuch as you, Merchant, impose the obstacles by creating or increasing them, you undoubtedly are blameworthy. If you simply take advantage of the inherent asymmetries, you still remain without a desert basis for the benefits you derive, and, arguably, you even deserve to have them denied. With respect to you, Nonconsenter and Onlooker, I cannot confidently claim the moral high ground. Yet I can assert at least that my ground is as high as yours. It is unfortunate

178. Kennedy's position stands: "[T]here are extant no theories of moral conduct or of rights that convincingly indicate even in their own terms what the rules about agreements *should be*." Kennedy, *supra* note 4, at 565.

179. Recall "the sober Kantian reminder that, if man is an animal who needs a master, the masters, too, are just such animals. Masters are prone to do evil not merely out of self-love or malice, but out of misguided zeal." John M. Finnis, *Legal Enforcement of "Duties to Oneself": Kant v. Neo-Kantians*, 87 COLUM. L. REV. 433, 456 (1987) (footnote omitted).

that all three of us cannot get what we want, but why should I defer to you? In the end, none of you has a personal moral claim against my limited, reasonable invocation of government assistance. Moreover, the proposed regulation appears to make the market more efficient."

The three anti-interveners are ultimately resorting to what might be called a second order, self-regarding stance. The argument is mainly one-to-many, against society as a collective.¹⁸⁰ By way of summary, once the outer defensive walls are weakened or breached by Consenter's first order attack, the anti-interveners retreat to this citadel: "Yes, there may be unfairness and inefficiency in the marketplace, but, be that as it may, you, with the collective at your side, cannot be trusted to intervene in such a manner as to do more good than bad, more justice than injustice.¹⁸¹ Even if there is merit to your proposal, public choice theory suggests that this alone does not determine the legislative response.¹⁸² History is replete with examples of the misuse of government power and scant with counter-

180. Strasnick analyzed society's paths to resolve the conflicting interests of individuals in light of the public interest or social good. See Steven Strasnick, *Individual Rights and the Social Good: A Choice-Theoretic Analysis*, 10 HOFSTRA L. REV. 415 (1982). He found the paths always controversial and frustrating of some private interests. *Id.* at 415. Strasnick concluded that, therefore, when society "has defined some unifying conception of the social good, the basic conflict may still not have disappeared but may merely have changed its character. Individual interests, once in conflict with other individual interests, are now in conflict with the social good." *Id.*

181. One must not confuse

two very different questions, namely 'Is it right for people to act in a certain way?' and 'Is it right for the state to command such action?'. . . . For questions of the latter sort demand a consideration of evils inherent in the legal process itself . . . as well as those evils which the law attempts to prohibit.

FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS* 62-63 (1933). For an example of this criticism aimed at judicial intervention, see Alan Schwartz, *Seller Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367, 368 (1974) ("My thesis is that courts are institutionally incapable of choosing the defining values [of the notion of unequal bargaining power] and finding the relevant facts.").

182. For introductions to the economic theory of regulatory decisionmaking that derives from public choice theory, see Bruce Chapman & John Quinn, *Efficiency, Liberty and Equality: Three Ethical Justifications for Regulatory Reform*, 20 OSGOODE HALL L.J. 512, 529-34 (1982); Jonathan R. Macey, *Public Choice: The Theory of the Firm and the Theory of Market Exchange*, 74 CORNELL L. REV. 43, 45-52 (1988). "Public choice theory's general prediction is that small groups of voters with low organization costs and potentially large *per capita* gains from the favourable regulatory decisions will become disproportionately influential in the regulatory process." Chapman & Quinn, *supra*, at 529. Small groups can, first, better control freeriders and, second, with the large *per capita* gains as an incentive, better mobilize members for coordinated political action. See *id.*; Macey, *supra*, at 48. For a general introduction to public choice theory capped by the argument that it has unduly influenced legal scholarship by implanting a deep distrust of legislatures that is not adequately supported, see Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987).

examples.¹⁸³ Therefore, in the name of social good and justice, even if at some tradeoff of private good and justice, your proposal, Consenter, should be rejected."¹⁸⁴

In further pursuing this second order argument, the anti-interveners will point out, as seen in the last line of the dialogue, the analogy between it and Consenter's first order argument. As the consumer is subject to irrationalities of various origins in making individual choices, so also is society subject to irrationalities in making collective choices,¹⁸⁵ and even additional ones.¹⁸⁶ To elucidate,

There are other reasons that merit might not determine legislative decisionmaking. For example, "majority [political] views may be, though they are not always, ill-informed and impervious to argument." H.L.A. HART, *Between Utility and Rights*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 198, 218 (1983). Wonnell summed up some of the problems documented by public choice theory: "[T]he information reaching legislators is starkly distorted; subtleties of detail are lost in statistical aggregates, and concentrated interests lobby heroically. As for incentives, the democratic process creates an incentive to pass a continuous stream of laws with visible, concentrated benefits and invisible, diffuse harms." Christopher T. Wonnell, *Problems in the Application of Political Philosophy to Law*, 86 *MICH. L. REV.* 123, 141 (1987) (footnotes omitted).

183. Political conservatives are particularly concerned about this. For an extended example of this conservative, second order response to proposed intervention, see Epstein's implicit criticism, Richard A. Epstein, *Luck*, *SOC. PHIL. & POL'Y*, Autumn 1988, at 17, of the redistributive implications of Christman's argument that "competitive markets do not allocate goods according to a principle of desert," John Christman, *Entrepreneurs, Profits and Deserving Market Shares*, *SOC. PHIL. & POL'Y*, Autumn 1988, at 1, 16. Liberals also worry. For example, Ackerman, noting the "countless ways in which a laissez faire regime fails to allocate resources efficiently," which may be improved upon by government intervention, fretted about "the illiberal uses that a utilitarian may make of the market-failure rationale." ACKERMAN, *supra* note 35, at 265; *see also id.* at 235 (indicating apprehension over potential corruption of public officials who legislate and administrate intervention).

184. The conclusion cuts more than one way:

There are many good acts that ought to be prohibited either because they cannot be clearly distinguished in the law from the more important evils, or for any of the other reasons suggested above [such as the one quoted *supra* note 181]. . . . And for the same reasons of general expediency and security the law must permit and even command acts that are bad.

COHEN, *supra* note 181, at 65.

185. *See, e.g.*, Scott, *supra* note 8, at 349 ("If consumers are susceptible to judgmental bias, then regulators are similarly imperiled."). Becker believed that the imperfections in the political sector, at least as important as those in the marketplace, have major implications for the question whether "the existence of market imperfections justify government intervention." GARY S. BECKER, *Competition and Democracy*, in *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 33, 37-38 (1976). "The answer would be 'no' if the imperfections in government behavior were greater than those in the market. It may be preferable not to regulate economic monopolies and to suffer their bad effects, rather than to regulate them and suffer the effects of political imperfections." *Id.* at 38; *but see* FRANK H. KNIGHT, *Freedom as Fact and Criterion*, in *FREEDOM AND REFORM*, *supra* note 44, at 1, 2-3 (cautioning against "emphasis on the stupidity of governments rather than the competence of individuals"). Regarding Becker's view, the relative imperfections of the market and the political sector is an empirical question that probably varies with circumstances. *See* Neil Komesar, *In Search of a General Approach to Legal Analysis: A*

a pluralistic society committed to a neutral conception of the "good", as is ours, has the demanding task of accommodating a wide range of acceptable values, some of which are difficult to understand and empathize with.¹⁸⁷ Social choice can be swayed by special pleaders just as individual choice can be skewed by interested parties.¹⁸⁸ Even if those with a special interest in legislation, presumably here a majority of the electorate, attempt to maintain themselves in a position of reflective equilibrium,¹⁸⁹ the self-deceptive rationalizations of the interested, compounded by the demagoguery of the ambitious, too easily lead to misguided

Comparative Institutional Alternative, 79 MICH. L. REV. 1350, 1359 (1981). Unfortunately, the empirical task is awesome. See *id.* at 1359-60.

186. One problem is that a "normative theory of [group] rationality, linking action to desires and beliefs," must face the difficulty from "the principle of methodological individualism[] [that] there do not exist collective desires or collective beliefs." ELSTER, *Introduction*, *supra* note 8, at 3. Then, under Arrow's impossibility theorem for social choice, one cannot assume that group choices have "the consistency properties required by the descriptive conception of rationality." *Id.* Under the cartelization or rent-seeking theory of the political process, which "views politics as a negative sum game," and under the capture theory of regulation, which "contends that the regulatory process is often captured by the regulated, to the detriment of the citizenry," the justification for regulation is challenged. Romano, *supra* note 88, at 320 (footnote omitted). See, e.g., George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971) ("[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit."). Romano doubted, however, that consumers would be disadvantaged by disclosure requirements, though they may be under a regime of product regulation. See Romano, *supra*, at 320-21.

187. See Kennedy, *supra* note 4, at 647-49. Owing mainly to this factor, in the final paragraph of his article discussing "ad hoc paternalism," Kennedy urged a surprisingly tame conclusion: "The only way to reduce the risk of making mistakes for which one is responsible no matter how good one's intentions is to deal with people who are not at a great distance, who are not strangers." *Id.* at 649. It seems to me that conservatives, if I can empathize with them, might accept Kennedy's agenda, if this is all it is. Apparently I can empathize with conservatives, Milton Friedman anyway, see *infra* note 198.

188. See *supra* note 182 for a discussion of public choice theory.

189. Reflective equilibrium, championed by Rawls, is a means of reaching "considered judgments duly pruned and adjusted" by going back and forth among contemplated premises, convictions, and principles. RAWLS, *supra* note 4, at 20. The issue, arguably, is not one of second-best.

'First best' principles correspond roughly with the ideal of pure normative philosophy, while any factual 'imperfections' in the world such as incomplete information or incentives to misuse power generally are accommodated by more or less ad hoc modifications of the first best principles. . . . [T]he applied political philosophy ideal seeks a philosophy that produces good results when the fallible political human mind consciously interacts with it; it is not second best because there is no alternative philosophy that could produce better interactions.

Wonnell, *supra* note 182, at 128-29 (footnote and emphasis omitted); cf. *supra* note 103 (theory of second best).

enactments.¹⁹⁰ Finally, because the relatively powerful are better able to exploit inherent and imposed sources of irrationalities, this class is more likely to reap the benefits of unwise public actions as well as private ones.¹⁹¹ In sum, there is little guarantee that social choices are rational.

While there is no way to silence these first and second order arguments, they can be quieted. The self-paternalistic collective, pulling down the veil of ignorance to circumvent the subjectivities of special interests and the improprieties of outright paternalism, would rationally choose to design the political marketplace *ex ante* in such a way as to minimize the risk of irrational social choices, that is, those choices that are contrary to the public weal.¹⁹² The plausible political strictures are procedural, substantive, and structural.¹⁹³

190. Sunstein also was disquieted by the rationality of intervention to prevent the exploitation of distorted preferences: "The argument that preferences are nonautonomous may be used as a pretext to disguise illegitimate motivations; and a court or other institution will not have an easy time distinguishing pretext from reality." Sunstein, *supra* note 7, at 1172. Nevertheless, this "does not undermine the claims that there are significant malfunctions in a system based on private preferences, and that the malfunctions sometimes do and should serve as the basis for legal intervention." *Id.* Going further, Goodin challenged the critics of market intervention who perceive the political sector also as a market, yet object to the operation of this market as being "motivated by dishonorable 'distributional' rather than honorable 'efficiency' considerations. . . . Minimally, advocates of markets over politics must explain what makes money, and 'efficiency' defined in terms of it, so decisively superior to the currency of votes and efficiency defined in terms of them." Robert E. Goodin, *The Ethics of Smoking*, 99 ETHICS 574, 605 (1989) (references omitted).

191. Because it is more economic for merchants to influence the government, and the consumer as voter is subject to imperfect conditions for rational choice, "[u]nder these conditions, government is bound to be more attentive to producers than consumers when it creates policy." Downs, *supra* note 159, at 255.

192. Facing the general problem of irrational social choice, Fuller proposed "the political metatheory of irrationalism," originating with Machiavelli, whose "fundamental precept is that no political theory or program should be accepted unless it somehow takes into account the cognitive liabilities of the large numbers of people who would function as governors and governed." Steve Fuller, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549, 579 (1988) (emphasis omitted). In particular, "Axiomatic social choice theory . . . reveals the imperfection not only of the invisible hand of the market, but of the visible hand of the state and of the cheshire-cat hand at work in a mixed economy—in any legal order." Allan Gibbard, *Social Choice Theory and the Imperfectability of a Legal Order*, 10 HOFSTRA L. REV. 401, 402-03 (1982). Gibbard concluded that, if his analysis holds, "a main task of the further development of the subject [of axiomatic social choice theory] will be an exploration of the compromises that must be made in the design of a legal order." *Id.* at 413. Murphy stated that a check on arbitrary government action requires "the formulation of a public, objective theory of rationality and rational willing." JEFFRIE G. MURPHY, *Marxism and Retribution*, in RETRIBUTION, JUSTICE, AND THERAPY, *supra* note 14, at 93, 101-02. The social contract theory, in the view of Kant and Rawls, can provide this and avoid arbitrariness by allowing objective evaluation of chosen rules. *Id.*

193. The reason the government was originally established, at least a rational justification for it, is self-paternalism. Hume, like Hobbes, thought so by means of this

The liberal founders of the American political system opted to ameliorate the risk of misguided social choices primarily by two mechanisms: a constitutional form of government with decentralized concentrations of power.¹⁹⁴ The Constitution and amendments specifically guarantee vital individual rights.¹⁹⁵ In further amending the Constitution, substantial procedural hurdles and mandated super-majoritarianism protect against curtailments of these existing rights. Forced to stand back from the turmoil of passing passions when making momentous decisions, the cooled contemplation of the political persona fosters reflective equilibrium.¹⁹⁶

Ill-conceived actions by a governmental body, though depending somewhat on the subject matter and the place in the hierarchy, must

reasoning: Though voluntary conformity to the principles of justice is in one's long-term interest, because it will gain the cooperation of everyone else, often one's short-term interest is to violate the principles. Because people often succumb to the temptations of smaller short-term gains, this destroys the trust of others who then refuse to cooperate. The predicament is solved by binding oneself to the principles of justice by founding a government in which it is made in the public officials' immediate interest that the principles, made into rules, be observed. See MACKIE, *supra* note 174, at 106-08; Dworkin, *supra* note 7, at 23; see also HAYEK, *supra* note 36, at 180-82 (noting that constitutional system does not involve absolute limitation on will of people, but merely subordination of immediate objectives for long-term ones); RAWLS, *supra* note 4, at 248-49. The main difficulty of the solution is in keeping it in the interest of the officials that the rules be observed. Perhaps, "[i]nstead, the goal is to make sure that undesirable individual traits are localized (but not wholly neutralized) by a network of institutions that diffuse power in ways political scientists interested in pluralism have long stressed." Richard A. Epstein, *Private Property and the Public Domain: The Case of Antitrust*, in ETHICS, ECONOMICS, AND THE LAW 48, 53 (J. Ronald Pennock & John W. Chapman eds., 1982).

194. "[T]he correct aim for an economics-minded constitutional designer apparently is to precribe [sic] a set of institutions calculated to minimize over time the total of the costs of market failure and political failure." Frank I. Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 494-95 (1979). Though probably no one particular constitutional model is demonstrably the best at this, "One can, however, contend with at least surface plausibility that the typical republican model is a reasonable one for minimizing the total of the costs to individuals of their interactions in society . . ." *Id.* at 495.

195. See Sunstein, *supra* note 7, at 1141 ("The Constitution itself may be regarded as an effort to prevent present or future majorities from engaging in imprudent conduct; constitutional rights may be understood as the protection of second-order preferences."); see also, JEFFRIE G. MURPHY, *Cruel and Unusual Punishments*, in RETRIBUTION, JUSTICE, AND THERAPY, *supra* note 14, at 167, 223 ("The Constitution is a document of moral principle and is in this sense anti-democratic."). Sagoff, *supra* note 102, at 1395 n.11 ("The threat of tyranny . . . requires only that this [legislative] power [to make policy based on moral belief] be constrained by a system of civil and political rights."); but see Hubin, *supra* note 12, at 90-91 (questioning whether Constitution can be seen as case of precommitment).

196. For example, the rights of property and contract must be protected from "the sudden and strong passions to which men are exposed." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 138 (1810). See HAYEK, *supra* note 36, at 181-82 ("A free society certainly needs permanent means of restricting the powers of government, no matter what the particular objective of the moment.").

often pass the scrutiny of another governmental level (e.g., state and federal) or branch (e.g., legislative and judicial). When this occurs, the deliberative processes leading to a questionable result must be partially replicated each time another level of government considers a complementary matter. The separation of powers within each level also facilitates moderation. If, say, the legislative branch is caught up in the passions of the moment, the executive or judicial branches may temper them. Finally, an important restraint of government irrationality is that the elected officials must anticipate the periodic justification of their actions to the electorate. This is done after transient passions have cooled and in a manner akin to the neutral dialogue between private parties.¹⁹⁷

The efficacy of these collectively self-paternalistic political structures is, however, probable only, not certain. Is social choice then, "in fear and trembling,"¹⁹⁸ relegated to nonexperimentation or, at best, pessimistic incrementalism? I think not, though eternal vigilance is in order.¹⁹⁹ The issue of rational intervention turns largely on relative institutional competence.²⁰⁰ There are matters best handled by private individuals, while others are best handled by the government or by a particular level or branch. Deference, but not obeisance, is given to the decisionmaker who, under the circumstances, is apparently best able to minimize irrationalities, to avoid the risks. This may be due to the decisionmaker's privileged position, the economies, the capacity to perceive and manage spillovers, the relative balance of power among antagonists, or a myriad of other factors. Having raised this formidable specter of determining

197. Even without an election to worry about, officials, as in a neutral dialogue, "should be prepared to justify their conduct by stating in logical form the evaluative generalizations and factual statements on which they base their evaluative conclusions. Without this, the conclusions might be 'reasonable,' to use Dewey's distinction, but they would not be 'reasoned,' that is, logically controlled." EDWIN W. PATTERSON, *LAW IN A SCIENTIFIC AGE* 31 (1963) (footnote omitted).

198. Kennedy concluded that, principled paternalism being problematic, the ad hoc paternalist must act, if at all, cautiously, "in fear and trembling." See Kennedy, *supra* note 4, at 644. Strangely, even Milton Friedman, no enthusiast for intervention, especially when paternalistic, spoke with less trepidation when he recognized that we must face up to the unavoidability of paternalism. "We must put our faith, here as elsewhere, in a consensus reached by imperfect and biased men through free discussion and trial and error." MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 34 (1962).

199. The innuendo refers to the famous quote from a speech by John Philpot Curran in 1790: "The condition upon which God hath given liberty to man is eternal vigilance; which condition if he break, servitude is at once the consequence of his crime and the punishment of his guilt." JOHN BARTLETT, *FAMILIAR QUOTATIONS* 397 (15th ed. 1980). (The footnote at the semicolon reads in part: "Attributed also to Jefferson." *Id.*)

200. See generally Komesar, *supra* note 185 (arguing that all legal decisions depend on choice between imperfect alternative decision-making institutions in order to find one that is least imperfect).

relative institutional competence, I leave the details to others.²⁰¹ Still, without more bother with the details surrounding mandatory warranty offerings, especially since warranties are appearing in various markets without government prodding, it seems that many of the purported risks of expanding the mandatory offerings are not undue.

Let me succinctly conclude. The asymmetry between the actors in the marketplace in the conditions of rational decisionmaking leads to unfairness to the consumer and, seemingly, inefficiency. Private self-paternalism as a general device, we learn from Odysseus, is rational and justifiable, and this applies to the consumer's methods for countering the asymmetry. Under the circumstances, because purely private means are unworkable, government intervention is inviting. This creates the risk of other manifestations of irrationality and unfairness, in particular, those resulting from the governmental processes themselves. Therefore, in the end, we must learn another lesson from Odysseus — how to maneuver between Scylla and Charybdis.

201. "It only remains to work out the details — but in everyday life, the details are everything." MICHAEL WALZER, *SPHERES OF JUSTICE* 91 (1983). Coase declared that the particulars of government regulation must "come from a detailed investigation of the actual results of handling the problem in different ways." Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1, 18-19 (1960). The prognosis for ideal solutions is bleak. "In practice we must usually choose between unjust arrangements and then it is a matter of finding the lesser injustice." John Rawls, *Distributive Justice*, in *PHILOSOPHY, POLITICS AND SOCIETY* 58, 72 (Peter Laslett & W.G. Runciman eds., 3d series 1967).